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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 143.

PHILADELPHIA BAR ASSOCIATION

IRA T. CLEMENT, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 21, 1884.

Duncan 21852

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1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein Elisha A. Packer is plaintiff and Ira T. Clement is defendant, may be found the following words and figures, to wit:

Appearance Docket and Entries.

Nov'r Term, 1881.

ELISHA A. PACKER, a Citizen of the State of New York,
versus
IRA T. CLEMENT, a Citizen of the State of Pennsylvania. } No. 19.

J. W. Ryon; S. P. Wolverton.

Precipe for summons in ejectment filed July 12, 1881, and July, 16, 1881, summons ejectment, returnable first Monday of September next, issued—for that the defendant now has in his actual possession a tract of land situate in Mt. Carmel township, in the county of Northumberland, in the western district of Pennsylvania, bounded as follows: Beginning at a point three hundred and nineteen rods south two degrees west of the northwest corner of a tract of land surveyed the second day of October, 1793, by virtue of a warrant granted by the Commonwealth of Pennsylvania to Mary Myers, thence
2 south eighty-eight degrees east two hundred forty-one rods to a post, the southeast corner of said Mary Myers' tract of land; thence south two degrees west sixty rods to a post; thence north eighty-eight degrees west two hundred forty-one rods to a corner; thence north two degrees east sixty rods to the place of beginning, containing ninety-four acres of land, and being a part of a larger tract of land surveyed the twenty-second day of October, 1794, by virtue of a warrant granted by the Commonwealth of Pennsylvania unto William Elliott the twenty-sixth day of November, 1793, the right of possession and title to which plaintiff says is in him and not in the defendant. 1881, July 18. Summons served upon defendant by leaving a true copy thereof at his dwelling with an adult member of his family. Mar., $18.10.

1881, July 19. Pleas of defendant filed. 1881, November term. Trial continued at costs of plaintiff. 1882, May term. Trial continued. 1882, November 16. Plaintiff's counsel moves the court for leave to amend his description of the land in suit; amendment allowed and filed and trial of case continued over this term. 1883, May 10. Agreement to continue above case over May term, 1883, filed. 1883, May 14. The trial of this cause continued and by agreement of counsel ordered for trial at next term of this court, at Williamsport. 1883, November 19. Case called for trial and jury sworn and trial proceeded with. 1883, November 20. Trial proceeds.
3 Nov'r 21. Trial proceeds. Nov. 23. Trial proceeds. Nov'r 24. Trial proceeds. Nov. 26. Trial proceeds. Nov'r 27. Trial proceeds. Nov'r 28. Trial proceeds. Nov'r 30. Trial proceeds. Dec. 1. Trial proceeds. Dec. 3. Trial proceeds. Dec. 4. Trial proceeds. Dec. 5. Trial proceeds. Dec. 6. Trial proceeds. Dec. 7. Trial pro-

ceeds. Dec. 8. Trial proceeds. Dec. 10. Trial proceeds. Dec. 11. Trial proceeds. Dec. 12. Trial proceeds. Dec. 13. Trial proceeds. Dec. 14. Trial proceeds. Dec. 15. Trial proceeds. Dec. 17. Trial proceeds. Dec. 18. Trial proceeds. Dec. 19. Trial proceeds. Dec. 20. Trial proceeds. Dec. 21. Trial proceeds. Dec. 26. Trial proceeds. Dec. 27. Trial proceeds. Dec. 28. Trial proceeds. Dec. 29. Trial proceeds. 1883, December 29. Jury return a verdict for plaintiff for the land described in the declaration of plaintiff as amended, with six cents damages and costs of suit; H. D. Gamble, clerk; exceptions of plaintiff and defendant to charge of the court filed; charge of the court to jury filed; plaintiff's points and answers of court; also defendant's points and answers of the court thereto filed.

1884, January 15. Judgment upon the verdict; H. D. Gamble, clerk. 1884, January 18. Bond for costs on writ of error approved and filed. Same day. Petition for writ of error presented, and writ allowed, returnable at Washington, D. C., on the second Monday of October next.

1884, June 6. Plaintiff's bill of costs filed. 1884, October 4. Citation to plaintiff herein, returnable in the U. S. Supreme Court
4 on the second Monday of October, 1884; allowed by M. W. Acheson, J.

1884, October 10. Defendant's bill of exceptions, sealed by M. W. Acheson, J., and bearing date December 29, 1883, filed.

5 *Precipe for Summons in Ejectment.*

In the Circuit Court of the United States, Western District of Pennsylvania.

ELISHA A. PACKER *vs.* IRA T. CLEMENT.

Issue writ in ejectment against Ira T. Clement, a citizen of the State of Pennsylvania, the defendant to appear and answer to a certain complaint made by Elisha A. Packer, a citizen of the State of New York, that he, the said defendant, now has in his actual possession a tract of land situate in Mt. Carmel township, in the county of Northumberland, in the western district of Pennsylvania, bounded as follows: Beginning at a point 319 rods south two degrees west of the northwest corner of a tract of land surveyed the 2nd day of October, 1793, by virtue of a warrant granted by the Commonwealth of Pennsylvania to Mary Myers, thence south eighty-eight degrees east 241 rods to a post, the southeast corner of said Mary Myers' tract; thence south 2 degrees west 60 rods to a post; thence north eighty-eight degrees west 241 rods to a corner; thence north 2 degrees east 60 rods to the place of beginning, containing 94 acres of land, and being a part of a larger tract of land surveyed the 22nd day of October, 1794, by virtue of a warrant granted by the
6 Commonwealth of Pennsylvania unto William Elliott the 26th day of November, 1793, the right of possession and

title to which the said plaintiff says is in him and not in said defendant; all of which said plaintiff avers he is prepared to prove.

Returnable to 1st Monday of Sept., 1881.

J. W. RYON, *Pl'ff's Att'y.*

To clerk circuit court U. S. western district Penna.

Indorsed: No. 19. November term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Precipe for ejectment. Filed July 12, 1881. J. W. Ryon.

7 *Summons.*

UNITED STATES, *Western District of Pennsylvania,* } *sct:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon Ira T. Clement, a citizen of the State of Pennsylvania and late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the first Monday of September next, to answer to Elisha A. Packer, a citizen of the State of New York, in an action in ejectment for a tract of land situate in Mt. Carmel township, in the county of Northumberland, in the western district of Pennsylvania, bounded as follows: Beginning at a point 319 rods south two degrees west of the northwest corner of a tract of land surveyed the 2nd day of October, 1793, by virtue of a warrant granted by the Commonwealth of Pennsylvania to Mary Myers, thence south eighty-eight degrees east 241 rods to a post, the southeast corner of said Mary Myers' tract of land; thence south 2 degrees west 60 rods to a post; thence north eighty-eight degrees west
241 rods to a corner; thence north 2 degrees east 60 rods to
8 the place of beginning, containing 94 acres of land, and being a part of a larger tract of land surveyed the 22nd of October, 1794, by virtue of a warrant granted by the Commonwealth of Pennsylvania unto William Elliott the 26th day of November, 1793, the right of possession or title to which the said plaintiff says is in him and not in said defendant; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 16th day of July, A. D. 1881, and in the 106th year of the Independence of the said United States.

[Seal U. S. Cir. C't, W. D. Pa.]

H. D. GAMBLE, *Clerk.*

Service.

July 18, 1881, served the within summons on Ira T. Clement by leaving a true and attested copy of the same at his dwelling-house with an adult member of his family.

So ans.:

JOHN HALL, *U. S. M.*,
Per L. H. MARTIN, *Deputy.*

Indorsed: No. 19. Nov'r term, 1881. Circuit court of the United States. Elisha A. Packer *vs.* Ira T. Clement. Summons. J. W. Ryon, attorney for plaintiff.

9 *Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov'r Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

And now, July 18, 1881, the defendant pleads not guilty.

S. P. WOLVERTON,
Counsel for Def't.

To H. D. Gamble, Esq., clerk.

Indorsed: No. 19. Nov'r term, 1881. E. A. Packer *vs.* I. T. Clement. Plea. Filed July 19, 1881. Wolverton.

10 *Amendment to Precipe of Pl'ff.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov. Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

By leave of court first had and obtained the description of the land in the precipe and writ in this case is amended so as to read as follows:

Beginning at a post 319 perches southward from the northwest corner of a survey in the name of Mary Myers, dated October 2nd, 1793, being the southwest corner of the said Mary Myers tract; thence extending south 86° E. 240 perches, more or less, to a post, the southeast corner of said Mary Myers tract; thence S. 4° W. 60 perches to a corner; thence N. 86° W. 240 perches, more or less, to a stone; thence south 4° W. 33 perches to a stone; thence N. 86° W. about 14 perches to the eastern line of the Thos. Rees, Jr.; thence N. 61° W. 120 perches to the southern line of the Charlotte Ruston tract, located at the official distance from its northern lines; thence along said south line of the Charlotte Ruston tract S. 86° E. 140 perches to the southeast corner of the Charlotte Ruston tract,

and thence N. 4 E. 32.9 perches to the beginning, containing 120 acres, more or less.

11 Indorsed: No. 19. Nov. sessions, 1881. E. A. Packer *vs.* Ira T. Clement. Amendment of plaintiff's precipe and writ. And now, to wit, Nov'r 16, 1882, the within amendment allowed. By the court. Filed Nov'r 16, 1882. Ryons — Lynn, for pl'ff.

12 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

And now, Nov'r 19, 1883, the above case called for trial and the following jury sworn: M. S. Duffield, David Hamilton, H. B. Drabelle, Wm. P. Smith, John T. Richardson, Joseph Detwiler, Robert S. Davis, Henry N. Potter, S. H. Graham, James Condon, C. M. Underwood, and Nathaniel Morris.

Whereupon counsel for plaintiff opens case and proceeds to offer evidence from day to day, closing on November 30th, when defendant's case is opened by his counsel and testimony on his part taken, closing on December 8th, after which plaintiff offered evidence in rebuttal, which was followed by evidence on part of defendant, closing the evidence in the case on December 20.

Thereupon counsel for the respective parties submit their points for instruction to the court and argue the same, followed by arguments to the jury, when the court, on December 29, charges the jury, who retire, and, after due deliberation, return with a verdict for plaintiff for the premises described in the declaration of the plaintiff as amended.

H. D. GAMBLE, *Cl'k.*

1884, January 15.—Judgment upon the verdict.

H. D. GAMBLE, *Cl'k.*

13 *Pl'ff's Points.*

In the Circuit Court of the United States, Western District of Pennsylvania. Nov'r Term, 1881.

E. A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

The counsel for plaintiff respectfully ask the court to charge the jury as follows:

1st. That according to all the evidence in the case the batch of eleven surveys, beginning with the Daniel Reese, the leading survey

on the west, and extending to the Samuel Lobdell on the east, have their north line regularly run and the corners and line clearly marked and defined upon the ground; that the line so run and marked indicates and points out the location as the deputy surveyor laid them upon the ground; that the surveys having been returned into the land office and allowed to remain there unquestioned for a period of more than twenty-one years, the presumption of law is conclusive that the deputy surveyor ran the lines upon the ground according to the shape and form of the official drafts of such surveys returned by him into the land office, and that such pre-
14 sumption is not rebutted by failure to find marked lines upon the ground at the official distances called for in the returns of the survey after the lapse of a period of eighty years.

2d. That in the absence of marks upon the grounds indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys, the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances, as shown by the official return of survey, and cannot be extended to the south beyond their official distances.

3rd. That the fact that the corner claimed by the defendant as the corner of the Billington and Reynolds south is about sixty rods south of the official distance of said surveys, and that no line has ever been found between said claimed corner and the maple corner near the end of the official distances of said surveys found by Rockefeller and others, although there are timber trees standing between said points which could and probably would have been marked if any line had been run there, and the further facts that no
15 marks bearing the date of 1793 have ever been found upon the line claimed or running east from said corner for a distance of more than two miles, tends strongly to disprove and to discredit the said corner claimed by the defendant as the true corner on south of Billington and Reynolds.

4th. That the evidence shows that the eleven warrants in the name of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell were all taken out of the land office at the same time, the purchase-money was paid by one person, and the surveys made in one body and at one time for a single ownership, and that they were surveyed together as a single block on the 2d and 3d of October, 1793; that under such circumstances the eleven surveys adjoining and calling for each other constitute a single block, and for all purposes of this case are to be regarded as such. The fact is undisputed that the northern line was run and the corners and line well and distinctly marked upon the ground, and the dividing line between the Billington and Reynolds was also run and marked upon the ground
16 to a small maple corner called for as the southwest line of the Thomas Billington and the southeast corner of the John Reynolds. If the jury believe, from the testimony of David Rockefeller, William F. Roberts, Samuel Adams, and Frank Leisenring, that they found the small maple corner, in the fall of 1847, called for in

the official returns of these surveys, such corner would definitely fix the southern boundary of the eleven surveys and the plaintiff would be entitled to a verdict for the land in controversy.

5th. It being proved and not disputed in this case that the northern line of the Brush Valley surveys is well marked on the ground and the corners of said surveys designated by the original marks; they so definitely fix the location of each individual survey in the batch that in the absence of marks to fix definitely the southern boundary of the survey the said batch must be located from the northern lines by running out courses and distances of said surveys according to the official returns of William Gray.

6th. That where the deputy surveyor located the eleven Brush Valley surveys on the ground on the 2 & 3 days of October,
17 1793, is a question of fact depending upon the marks upon the ground then made by the deputy surveyor for these tracts. The said eleven surveys were so located upon the ground as to be surrounded on three sides—north, south, and east—by vacant land. After the lapse of 90 years, in the absence of marked lines to the contrary, the presumption is conclusive that this land was surveyed upon the ground just as the eleven surveys were returned into the office, and patents having been granted for these eleven surveys in 1794, ten of them to John Nicholson and one to Robert Morris, according to the courses and distances as returned into the land office, the lines and quantity of land were definitely fixed for each tract, and the true and proper way to now run them out is to start from the leading warrant, Daniel Reese, on the west and from the marked lines on the north and lay each tract off according to its courses and distances. The law determines the proper mode by which surveys are to be located, and the opinions of surveyors as to how these lands ought to be located or how they were originally put upon the ground cannot be received to change the manner of locating surveys determined by the law.

18 7th. The calls of the surveys of 1794, in the name of Richard Martin, on the east and of the surveys of 1794 on the west, in the name of Joseph Tyson and Thomas Reese, Jr., or the work found upon the ground younger than 1793, cannot effect the location of the block of eleven surveys. Hence the location of the Richard Martin to attach to the "post by the pine corner as its southeast corner" cannot be used to extend the lines of the Lobdell survey, and thus all of the eleven surveys south beyond the official distance and all the evidence and opinions of surveyors as to the location from the "post by the pine," and extending the eleven surveys by this line southward 34 perches or thereabouts at the Lobdell, and thus extend the whole batch of eleven south, must be disregarded by the jury, so far as it is sought to use the lines of the Martin to extend the lines of the eleven surveys beyond their official courses and distances.

8th. That the Richard Martin does not call to adjoin the Brush Valley surveys or any of them on the south, and that therefore the lines or marks upon the lines of the Richard Martin cannot be used

to extend the lines of the Brush Valley surveys to the south beyond their official distance returned into the land office.

19 9th. If the jury believe that the southeast corner of the Samuel Lobdell was fixed by the deputy surveyor at 320 rods from the northeast corner thereof, and that only about 150 rods of the south line of the Richard Martin was marked upon the ground from the "post by the pine" westward, and that no more of the said line was run upon the ground, the Richard Martin would in such case obey its call for the Samuel Lobdell, and it would be proper to change the course of said south line so as to extend it to the southeast corner of the Lobdell at 320 rods from the northeast corner of said Lobdell.

10th. That all the witnesses of the defendant have testified that, in their opinion, all the marked lines on the north-northeast and on the south of the Richard Martin were made in 1793 and before the warrant was issued for the Richard Martin survey; that no lines were marked on the west, and that the lines on the east adjoining the Francis West were made for the said West survey, it being older than the Martin and being a survey of 10th September, 1793. If this be true, then the lines belong to the Martin only by adoption, and show that the Richard Martin was not in fact actually

20 surveyed and marked upon the ground by the deputy surveyor, but that, on the contrary, the survey of the Martin was only plotted on paper and returned into the land office. The call therefore by the Martin for the Samuel Lobdell on the west of the Martin is not such a call for the Samuel Lobdell as to increase the east line of the Samuel Lobdell beyond its official distance.

11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jessie Brooks, and other older surveys on the south, and calls to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds on the north; that in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor the William Elliott must go to its calls for adjoinders on the north; that as there is no evidence of any such original marks the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official causes and distances from their northern line, or from the Rockefeller maple corner.

21 12th. That under all the evidence in the case the plaintiff is entitled to a verdict.

Answers to the Plaintiff's Points.

1st point. This point is affirmed striking out the word "conclusive." There is a presumption of law that the deputy surveyor ran the lines according to his official returns of survey, which is not rebutted by such negative evidence as is mentioned in the point, and nothing will overcome that presumption short of affirmative proof of lines run upon the ground variant from the official surveys as returned into the land office.

2nd point. This point is affirmed.

3rd point. The facts mentioned in this point have already been brought to the attention of the jury in our general charge, which we think sufficiently answers the point.

4th point. This point is affirmed.

5th point. This point is affirmed.

6th point. This point is, we think, sufficiently covered by our general charge.

22 7th point. This point is, we think, sufficiently covered by our general charge.

8th point. This point is, we think, sufficiently covered by our general charge.

9th point. We do not feel called on in this case, especially in view of the conflicting testimony of the surveyors, to give a binding instruction as to the proper location of the southwest corner of the Richard Martin.

10th point. We think that in so far as is necessary this point is covered by our general charge.

11th point. This point is affirmed.

12th point. This point is refused.

Indorsed: No. 19. Nov. term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Plaintiff's points and the answers of the court thereto. Filed Dec. 29, 1883.

23 *Defendant's Points.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19 of Nov'r Term, 1881.

The counsel for defendants respectfully ask the court to charge the jury as follows:

1. That surveys made and returned as a block are to be located as a block, and that marks, courses, distances, and calls of any one of the tracts are to be considered as applicable to all with like effect as if the entire block was but one survey.

By a "block of surveys" is meant a number of surveys made on the same or successive days upon a batch of warrants issued at the same time and returned together, the surveys being located so as to adjoin and calling for each other in succession.

2. Surveys constituting a block are not to be treated as separate and individual surveys and each tract located independent of the rest by its own individual lines or calls or courses and distances, but such surveys are to be located together as a block or

24 one large tract. Surveys made and returned as a block must be located upon the ground in a block, whether lines can be found upon the ground or they were chamber surveys. If lines

and corners made for such block of surveys can be found upon the ground, this fixes the location of the block even to the disregard of calls for adjoiners.

The lines and courses found upon any part of a block of surveys belong to each and every tract of the block as much as they do to the particular tract which they adjoin.

3. The proper way to locate two adjoining surveys or two adjoining blocks where the junior calls for the older is to first locate the older and then give the junior whatever land there is left, unless there may be marks upon the ground which would prevent the junior going to its calls.

4. The lines run upon the ground constitute the actual survey of which the marks upon the ground are the best evidence, the lines on the draft returned being inferior and secondary, serving only to indicate the place of a line where the footprints of the surveyor cannot be traced; when they can be traced they locate the tract or block of surveys without regard to courses and distances in the draft, whose only office is to serve as a guide where no other is left.

4½. That if the jury believe the post by the pine is the southeast corner of the Richard Martin survey, and that actual monuments have been found in its southern line made or adopted for that survey, its southwestern corner would be where a line running from the post by the pine through these monuments would be intersected by a line running south from its northwest corner.

5. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor; and, in endeavoring to ascertain the proper location, the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believe that the said two surveys which call for the Lobdell were located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdell, such fact would be of importance in ascertaining the exact location of the Lobdell and of the block of eleven surveys of which it is a part.

6. The plaintiff must recover upon the strength of his own title, and as he has only shown title to the William Elliott survey he can in no event recover in this suit any land not embraced in the William Elliott survey.

7th. If the jury believe that the William Elliott is one of a block of surveys known as the Lafevre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks or monuments corresponding with the date of survey of this block on the northern line of any one of these surveys would be monuments for the northern line of the William Elliott survey and establish the northern line of the William Elliott.

8. If the jury believe the testimony of the defendant's surveyors that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established, and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that corner would be monuments fixing the whole northern line of the Lefevre block, and a line run
27 westward from the post by a pine corner by the official courses and distances of the northern line of said block by these trees would establish the northern line of the William Elliott survey.

9. That the rule which confines a survey to its courses and distances is only applied in the absence of other and better evidence in order to determine the exact location, and if there is any better evidence of the monuments upon the ground whereby the exact location can be ascertained such monuments are to be taken in preference to courses and distances.

10. That any monument on the ground called for or adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and in the present case if the jury believe that any part of the southern line of the block of eleven or Brush Valley block was run by the deputy surveyor, either from or to intersect the post by a pine as a mark indicating the location of the said southern line, the said post by a pine would be a monument which would control the mere evidence of official distances.

28 11. That where all other evidence fails and a location must be ascertained by courses and distances alone, the courses are as important as the distances, and if there is any monument upon the ground to establish the exact place at which a course was run and no monument to confine the limit of the survey to the exact official distance, the true course should be taken so as to agree with such monument and the official distance ignored if it conflicts therewith.

12. If the jury believe the defendant's surveyors who testify that the chestnut oak on the south of the Samuel Lobdell, the gum witness to the corner at the swamp, and the given line tree about six rods west of the gum witness were marked in 1793 as trees for the southern line of the Brush Valley block, such trees would be monuments for the whole southern line of the Brush Valley block of surveys, and the southern line of the said block should be located by the courses and distances of said line and these trees; and if a line so run would embrace the land in dispute the verdict should be for the defendant.

29 13. That if the jury believe any one of the said trees was marked in 1793 as a monument for the southern line of the said Brush Valley block such tree would be a monument for the whole southern line of the said block, and said line should be located on the ground by the courses and distances of the southern

line of the said block by such tree, and if a line so run would embrace the land in dispute the verdict should be for the defendant.

14. If the jury find from all the evidence that the southern line of the Brush Valley block when located was run upon the ground so as to include the land in dispute the verdict should be for the defendant.

Dec. 20, '83.

S. P. WOLVERTON,
T. H. PURDY,
GEO. A. JENKS,
For Defendant.

Answers to the Defendant's Points.

1st point. This point is affirmed.

2nd point. This point is affirmed.

3rd point. This point is affirmed.

4th point. This point is affirmed.

4½ point. We do not feel called on in this case, especially in view of the conflicting testimony of the surveyors, to give a binding
30 instruction as to the proper location of the southwest corner of the Richard Martin.

5th point. The jury may take into consideration the acts of the deputy surveyor mentioned in this point in determining the question whether or not the chestnut oak and the gums are trees marked by the surveyor in 1793 (as the defendant claims) to define the southern line of the block of eleven surveys—the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793 then the facts upon which this point is based would be of no importance in determining the controversy in this case.

6th point. This point is affirmed.

7th point. This point, as a whole, is refused. The William Elliott calls on the north for the Charlotte Ruston and Mary Myers and other members of the Brush Valley block, and no marks on the ground have been found to limit that call. Moreover, the official returns of the Lewis Walker survey, one of the Lefevre block, which adjoins the William Elliott on the east, adopts the Reynolds-Billington maple as a northern monument for the Walker. As we have already instructed the jury in our general charge, wherever the true line of the Brush Valley tracts called for by the Wil-
31 liam Elliott may be to that line, the William Elliott must go.

8th point. This point is refused.

9th point. This point is affirmed.

10th point. As a naked proposition, this point is correct and it is affirmed; but the jury will understand from our general charge that if they find that the chestnut oak and gums upon which the defendant relies are not trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block the post by the pine would have no control in the location of that block.

11th point. This point is affirmed.

12th point. This point is affirmed.
13th point. This point is affirmed.
14th point. This point is affirmed.

Indorsed: No. 19. Nov'r term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Defendant's points and the answers of the court thereto. Filed Dec'r 29, 1883.

32 *Charge of the Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

GENTLEMEN OF THE JURY: This is an action of ejectment brought by Elisha A. Packer against Ira T. Clement to recover about 120 acres of land situate in Northumberland county, Pennsylvania, which the plaintiff claims is part of a tract of land surveyed on the 22d day of October, 1794, on a warrant to William Elliott, dated the 26th day of November, 1793.

To the William Elliott tract the plaintiff has shown title.

The defendant has shown title to two contiguous tracts of land surveyed on the 2nd day of October, 1793, on two warrants dated June 11th of that year, one to Charlotte Ruston and the other to Mary Myers, and the defendant claims that the land in dispute is within the lines of these tracts, mainly within the lines of the Mary Myers.

The lands of the plaintiff and the defendant adjoin, and what is the true division line between them is the principal question in the case.

33 This question is to be solved by determining the location of the Charlotte Ruston and Mary Myers tracts as fixed by the deputy surveyor in 1793, the surveys of those tracts being senior to that of the William Elliott.

The Charlotte Ruston and Mary Myers are two of eleven warrants owned by Doctor Thomas Ruston, all dated June 11, 1793, and granted respectively in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell. They were all in the hands of the deputy surveyor at the same time, and as appears by his official returns the surveys upon the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds were made on October 2nd, 1793. The return of the Thomas Billington survey does not show the day on which it was made, but the Mary Ruston, which adjoins it on the east, was surveyed Oct'r 2nd, 1793, and the other five, viz., the Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell, were surveyed the next day, October 3rd, 1793.

The official returns show that Deputy Surveyor William Gray laid all these warrants. The eleven surveys were returned by him into the land office on the 3rd day of March, 1794.

34 These eleven tracts were located so as to adjoin each other side by side, the Daniel Reese, which was the leading warrant, being located at the western end of the series and the Samuel Lobdell at the eastern end. Each survey from the Reese to the Lobdell calls alternately for the adjoining survey proceeding from the west to the east in the order in which they have just been named.

The Daniel Reese calls for vacant land on the west and the Samuel Lobdell for vacant land on the east, and the whole eleven call for vacant land on the south.

They constitute a block or body of surveys and are to be located on the ground as a block.

These eleven tracts are known and have been designated in this case as the Brush Valley lands.

The William Elliott is one of a block of surveys of the date of October 21st and 22nd, 1794, embracing what are now known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for the those lands. The call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds.

There is no controversy as to the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans, and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793.

35 The William Elliott, calling on the south for these last-named surveys and on the north for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds, rightfully embraces all the land within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for by the William Elliott may be, to that line must it go.

The great question of fact for the consideration of the jury, therefore, is, Where did William Gray, the deputy surveyor, fix the southern lines of the Charlotte Ruston and Mary Myers and the other tracts of the Brush Valley block when he surveyed them, in October, 1793?

As regards the northern line of the Brush Valley Block, there is no controversy. The surveyors on both sides agree that the northern line throughout its entire length was well marked in 1793 upon the ground and all the corners of the eleven tracts on the north indisputably fixed. The contest between the parties relates to the southern line of the block.

The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances or from a certain alleged maple corner on the south, the same practical result for the purposes of this case being reached by whichever of these two methods the location is effected.

36 The location upon which the defendant insists involves a wide departure from the official returns of survey. For example, the official length of the eastern line of the Samuel Lobdell is 320 rods. The defendant's location lengthens this line 32 rods, thus carrying the southern line of the block at its eastern end that much further south. At the division line between the John Reynolds and Thomas Billington the defendant's location places the southern line of the blocks 61 rods south of the official distance, measuring from the north line. The official length of the western line of the Daniel Reese is 340 rods. The defendant's location, however, gives this line 426 rods, or an increase of 86 rods, thus carrying the southern line of the block at its western end that much further south.

If the true southern line of the Brush Valley block is where the defendant locates it the land in controversy belongs to that block and is covered by the Charlotte Ruston and Mary Myers.

On the other hand, if the southern line of the block is where the plaintiff contends, the land in controversy is outside of that block and within the lines of the William Elliott.

The official papers call for one living corner only on the southern side of the block of eleven surveys—the Brush Valley block. This call is for a small maple at the southeast corner of the John
37 Reynolds and southwest corner of the Thomas Billington. According to William Gray's official returns, that maple stood at the distance of 326 rods from the northeast corner of the John Reynolds and 342 rods from the northwest corner of the Thomas Billington.

If the actual position upon the ground of this maple can be established this will fix the southern line of the whole block of eleven surveys and of every member of the block and settle the question of location with which the jury have to deal.

The plaintiff claims that this maple corner was found and located as early as the year 1847 by David Rockafeller, a surveyor, who at that time was surveying these lands for Hugh Bellas. Mr. Rockafeller is dead, but his testimony at a former trial has been read in this case. He testifies that on running on that occasion the line between the Reynolds and Billington he found "at 340 perches" (*i. e.*, from the northwest corner of the Billington), "allowing for hills, &c., a maple stump with sprouts growing around it. The tree" (we quote from his testimony) "had apparently been about six or seven inches in diameter. It had been burnt, and the stump was about a foot high. The tree was lying down as it fell—right down the mountain, and the trunk of the tree was burnt entirely away for perhaps six or seven feet, with the exception of two narrow scales about an inch thick that were burned on the inside. This is a description of the tree as near as I can recollect. Then I have
38 said in my notes, 'Old corner, maple stump.'" Mr. Rockefeller testifies that he found at that time a chestnut oak witness to the maple corner, standing about eight feet west of the maple stump which he blocked and counted.

The chain carriers for David Rockefeller at that survey were

Samuel Adams and Frank Leisenring, both of whom were produced and testified before you. William F. Roberts, a mining engineer, who was present at the survey of 1847, has also testified in the case. The testimony of these three witnesses is corroborative in important particulars of that of David Rockefeller.

Several of the defendant's surveyors and also William McWilliams, whose testimony the plaintiff read, examined the chestnut oak witness (of which Rockefeller and those who were with him testify), or its remains, but at dates long subsequent to the survey of 1847. They testify that they saw no old axe mark or evidence thereof on the tree, but that it looked as if scarred by falling timber.

By the measurement of the plaintiff's surveyors, who have been examined before you, the "Rockefeller corner," as it is now designated, is a little further north than his measurement placed it. Mr. Cochran puts it 3.7ths rods north of the end of the cross-line as officially returned. Some of the defendant's witnesses by their chaining make it to be several rods still further north. Mr. Moore's measurement makes it 7½ rods north of the official call for distance. The land at this place is mountainous and rough, and in chaining it the surveyors do not precisely agree as to distance.

The defendant locates the maple corner at the edge of a swamp, at a point 387 rods south of the northeast corner of the John Reynolds, or 61 rods beyond the end of the official distance.

The defendant has read the testimony of John Fisher, now deceased, given upon a former trial. He states that in 1814 he was with Henry Donnel, who was surveying the lines of these tracts or some of them. In this testimony Fisher says, "We found stone corner and post that was near a small swamp at the head of the Second Gap run." If this statement is correct, it still leaves it altogether uncertain, both as to who made this stone corner and set up the post and the date when the corner was made. The calls in the Reynolds and Billington surveys for their common south corner, it is to be observed, are not for a stone corner and post or for either, but for a living corner, viz., a small maple; but John Fisher had been examined at a still earlier trial, and the plaintiff has read his testimony on that occasion. He does not therein mention the finding of a stone-and-post corner, but, speaking of what was done at the survey in 1814, says, "When they run across the valley they made a corner at the swamp;" and, again, "We made the corner 200 rods or more east of the pike."

The defendant claims that the corner at the edge of the swamp—the maple corner, as located by him—is witnessed by a gum tree first discovered in January, 1883, by M. B. Trescott, one of the defendant's surveyors. To establish this gum witness the defendant examined four surveyors, to wit, Mr. Trescott, George W. West, R. F. Brown, and H. S. Boyer. These witnesses testify that the gum bore evidence of an old axe mark and that it pointed to a small maple growing out of a stump. They, or some of them, blocked the gum and took the block to Sunbury. It was examined by these four surveyors; Mr. Trescott and Mr. Boyer say the block counted to 1793; Mr. West says it counted 88 or 89 years, adding that he thinks it

was marked in 1793; Mr. Brown says he counted it once 85 years, once 86 years, and once 89 years, and he adds that it was almost impossible to count it accurately.

41 The plaintiff has brought into court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block. A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state that they find no old axe mark on this exhibit and no evidence of any. Several of these witnesses testify that they saw this gum when standing, and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evidence of any ancient axe mark.

In the midst of this conflicting testimony, which is well calculated to excite at least a doubt, both as to the existence of an ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the defendant's surveyors took from the tree would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter—but the defendant has not produced it, nor has he given any evidence explanatory of its absence.

42 This block was taken out so late as January last and was in the possession or under the control of the defendant. The withholding it, then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree.

In this connection we call the attention of the jury to the evidence relating to the original work found on the line running from the northeast corner of the John Reynolds southwardly to the small maple—*i. e.*, the division line between the Reynolds and the Billington. The plaintiff has clearly shown and, indeed, the defendant's surveyors—including some who testified to the contrary at former trials—state that that line is a well-marked line of the date of the original survey of 1793. Moreover, it is the only cross-line of the block upon which has been found any evidence showing actual work thereon by the surveyor. Now that the Reynolds-Billington line was actually run by the surveyor is a fact worthy of consideration; for it suggests that in returning the maple as 326 rods distant from the northeast corner of the John Reynolds the deputy surveyor

43 had ascertained the distance not by computation or protraction, but by actual measurement. It is indeed true that chaining might not insure against mistake. Yet, the line having been actually run upon the ground by the deputy surveyor, we might fairly expect to find the maple at the end of the line as officially returned, or within a reasonable distance thereof.

One other fact here (appearing from the uncontradicted evidence) seems to call for remark. All the marked trees on the Reynolds-Billington line are found north of the Rockefeller corner. No marked tree on the course of that line has been found between the Rockefeller corner and the point on the edge of the swamp at which the

defendant locates the maple corner, although the distance is over 60 rods and the line passes through timber old enough to bear the marks of 1793.

It appears from the evidence that frequent and careful examinations have been made by surveyors on the south of the Brush Valley block for a marked line. David Rockefeller testifies that he was never able to find any evidence, on the ground that William Gray in locating this body of lands made *any* mark for the southern boundary except the maple corner; and prior to 1879 no surveyor
44 of either side was able to discover any evidence, on the ground that the deputy surveyor actually ran the southern line of the block.

And just here is a fact deserving of consideration. While the official returns of the eleven tracts call for no less than 29 living corners (*i. e.*, trees) along the northern line, on the southern side of the block out of 17 corners called for but one is a living corner, viz., the Reynolds and Billington maple. The plaintiff's surveyors say that these calls for posts indicate that the deputy surveyor did not actually run the southern line, but, working from the northern line with the aid of the one cross-line at the division between the Reynolds and Billington, he finished his work by protraction or plotting. Several of the defendant's surveyors express a contrary opinion. One of them, however, T. W. Moore, states that, as a rule, surveyors take it for granted that where only posts are called for the line was not run on the ground.

In considering the fact that sixteen post corners and only one living corner are called for on the southern line of the block, the jury should bear in mind the evidence in the case respecting the
45 timber through which that line passes—whether upon the plaintiff's or the defendant's location.

The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793.

One of these is a chestnut oak at 140 rods westwardly from the southeast corner of the Samuel Lobdell, which tree was discovered and blocked by A. J. Guffey, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffey, Mr. West, and Mr. Boyer testify counted back to 1793.

T. W. Moore, however, one of the defendant's surveyors, says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands.

A. K. White, a surveyor, testifies that he counted this block at Lock Haven at a previous trial, and that it counted but 82 years, which would make it too young by four years for the survey of 1793.

To the like effect is the testimony of George B. Strauth and Robert Ammerman, surveyors, whose testimony at the trial at Lock Haven has been read in this case.

William T. Mitchell also counted the block at Lock Haven
46 trial, and he testifies that it counted but 82 years.

Here, then, is a direct conflict between the expert witnesses who have examined the block from the chestnut oak, and the greater number testify that the count fell short of the survey of 1793 by four years.

The block itself which, in connection with expert testimony, might have aided you essentially as well in correctly determining whether it bore an ancient axe mark at all (which is seriously disputed) as in solving the controverted question of age, has not been produced by the defendant nor its absence accounted for. The evidence traces the block into the defendant's possession. It was used by him as an exhibit at the Lock Haven trial, and it was there called in question as it is here. Why is it now absent when it so vitally affects the case?

This chestnut oak tree was examined by Mr. Edeburn, Robert McAdams, and A. B. Cochran in January, 1872. It had then fallen, but these witnesses state it had on it the leaves, they think, of the previous year, showing that it was still living in 1881. They testify there was no evidence of an ancient axe mark on any part of
the tree, and they give it as their opinion that the mark on
47 the eastern side of the tree from which the defendant's block
was taken was caused by a bruise or hurt. They blocked the western side of the tree, and also took out a block from the eastern side. These blocks are before you. Doubtless you will recall what the witnesses testified in respect thereto.

It is testified that if this chestnut oak were a line tree it should properly have been marked on its western side as well as its eastern side, but the witnesses last named testify that it had no evidence whatever of an axe mark on that side.

The other tree on his southern location, which the defendant claims to be a line tree of the survey of 1793, stood some six rods westwardly of the Reynolds-Billington corner, as located by him. Several of the defendant's surveyors testify that this gum bore two axe marks, made at different times, the one overlapping the other, with a growth of new wood between them. The outer mark, these witnesses state, counted to 1814. Mr. Wescott and Mr. West testify that the inner axe mark counted back to the survey of 1793. Mr. Brown, however (defendant's witness), says he counted from fifteen to eighteen growths between the two axe marks, but that it was
impossible to locate all the growths accurately, the wood be-
48 ing in part rotten; and Mr. Boyer (defendant's witness) says
that for this reason he was unable to count this gum beyond 68 years.

The defendant did not produce for your inspection the block or blocks which his surveyors took from this alleged gum line tree; but the plaintiff, as part of his rebutting case, brought into court and has exhibited to you that part of the tree which the defendant's surveyors blocked and it speaks for itself.

Much testimony has been given to show that under the most favorable circumstances the count of a gum is uncertain and unreliable.

It is for you to say, under all the evidence, of what value in establishing this disputed line is this gum, a specimen of which is before you.

We submit to you to determine as a question of fact, under all the evidence in the case bearing thereon, whether or not the chestnut oak and the two gums (the alleged witness to the maple corner and liner) are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block. If you find that they are or that any one of them is such marked tree, then the defendant would be entitled to your verdict.

49 It is, however, proper that we should here remind you that the southern line of the block is not less than seven miles long; that the evidence tends to show that along a great part of this line, whether upon the plaintiff's or the defendant's location, there is much timber old enough to bear the marks of the survey of 1793, none of which bears such marks, unless it be the three trees in question, and that these trees are found from 30 to 60 rods outside of the official courses and distances of the surveys as returned into the land office.

As the defendant alleges that these trees bear the marks of the survey of 1793 the burden of proof under the circumstances to establish the fact is upon him, and the jury ought not to find the fact in his favor unless they are satisfied that it is established by the preponderance or weight of the evidence.

We now direct your attention to another branch of the case.

There lies to the east of the Samuel Lobdell and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin; that warrant issued January 22d, 1794, and the survey thereon, according to the official return, was made on the 23rd of February of that year. It was, it would seem, returned into the land office on the 28th of Febr., 1794, or three days before

50 the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later.

The Richard Martin, therefore, is a survey junior to the Samuel Lobdell and its fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless. In the nature of the case it is a matter of pure speculation on the part of these surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years.

The Richard Martin calls on the east for the Francis West, a survey of September 10th, 1793, and these two surveys have a common south corner, viz., "a post by a pine;" but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly 32 rods beyond its official length to overcome

51 a mistake. The official length of that line is 250 rods, whereas the actual length is 282 rods. The south line of the Richard Martin running from the post by the pine is north 89¾°

west 308 perches to a post. There is evidence tending to show that for the distance of about 150 perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is 320 rods long, the same as the Lobdell's east line.

Now, the defendant's surveyors claim that even in the absence of proof of a marked southern line upon the Brush Valley block the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell and 32 rods further south than the deputy surveyor supposed it was, as is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so ran the southern line of the Richard Martin as to place its southwest corner 32 rods south of the south-
52 east corner of the Samuel Lobdell, as defined by William Gray's official return, and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about 32 rods further south than its official return locates it, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be 86 rods.

To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence and may be considered by the jury in connection with all the
53 other evidence in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line, according to the official courses and distances (unless indeed the jury should find in favor of David Rockefeller's location of the maple corner).

The authentic marks and corners upon the northern line (the evidence abundantly shows) are amply sufficient to locate the whole block of eleven surveys and every member thereof in conformity with the official returns of survey.

Now, it is a settled rule of law that in the absence of marked lines or monuments upon the ground or calls to indicate where the line or lines of a survey should be, then the courses and distances as officially returned must be resorted to in order to fix and define the boundaries.

54 After the lapse of twenty-one years from the return of the survey into the land office the presumption of law is that the warrant was located as returned by the surveyor, and in the absence of proof of marked lines or monuments to the contrary or of rebutting calls the presumption that the survey was located as returned must prevail, and the official courses and distances will govern.

In this case nearly ninety years have elapsed since William Gray filed in the land office his official returns of survey of the Brush Valley block, and unless you find the existence of marks or monuments upon the ground differing from the official courses and distances the latter must control.

(Here the court read and answered the points.)

The result of our general instructions and answers to the points may be thus stated:

1. If the jury find from all the evidence in the case that the true location of the maple corner called for by the John Reynolds and Thomas Billington is at the place where David Rockefeller located it in 1847, then the verdict should be for the plaintiff.

2. If, however, the jury find from all the evidence in the case that the chestnut oak and the two gums upon which the defend-

55 ant relies are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block or that any one of them is such marked tree, then the verdict should be for the defendant.

3. But should the evidence fail to satisfy the jury that said chestnut oak and gums or any of them are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern line of the block by running out the courses and distances as shown by the official returns of survey, and the verdict must be for the plaintiff.

Indorsed: No. 19. Nov'r term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Charge of the court. Filed Dec'r 29, 1883.

56 *Exceptions by Pl'ff to Charge, &c.*

In the Circuit Court of the United States, Western District of Pennsylvania. Nov'r Term, 1881.

E. A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

The plaintiff files the following exceptions and specifications of error, to be drawn out hereafter, to wit:

1st. The submission in the general charge of the line from the "post by the pine," and the instructions, with its proper connections in the general charge, that the jury may consider said line in determining the south line of the Brush Valley tracts; if they should find that said chestnut oak south of Lobdell and maple corner with gum witness and gum liner were marked in 1793 or if the chestnut oak or gum liner or witness were marked in 1793, then the verdict should be for defendant.

2. In refusing to affirm plaintiff's 12th point.

3. In refusing to affirm plaintiff's 9th point.

4. In the answer of the court to the def't's 5th point.

J. W. RYON,
JAMES RYON,
SAMUEL LINN,
Att'ys for Plaintiff.

The court direct within exceptions to be filed Dec. 29, 1883, by the court.

Indorsed: Exceptions & specifications of error of plaintiff. Filed Dec'r 29, 1883.

57 *Specifications of Error on Part of Defendant.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov'r Term, 1881.

E. A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Defendant's counsel file the following specifications of error, to be reduced to form hereafter:

1st. To the following portions of the general charge, with their necessary context:

"In the face of the return the opinion of surveyors that the Richard Martin was run at the same time as the Brush Valley block is entirely worthless."

2d. "The Richard Martin can have no weight unless the jury find in favor of the chestnut oak, the gum witness, and the gum line tree or some of them and the matters relating thereto."

3d. The court erred in answering the points of counsel for plaintiff and defendant as follows:

In their answers to the plaintiff's 2d, 3d, 5th, 6th, 7th, 8th, 10th, and 11th points and the following points of defendant's counsel: 4½, 5th, 7th, 8th, 10th.

4th. Also the following portions of the general charge, with their context, at top of page No. 2, as follows: "This question is to be solved by determining the location of the Charlotte Ruston and Mary Myers tracts as fixed by the surveyor in
58 1793, the surveys of those tracts being senior to that of the William Elliott."

5th. The following from page four, with its context: "Whereever the southern line of the Brush Valley tracts called for by the William Elliott may be, to that line must it go."

6th. On page 5th, "On the other hand, if the southern line of the block is where the plaintiff contends the land in controversy is outside of the block and within the lines of the William Elliott," with the context.

6th. That part of the charge on page 10, with its context, wherein the court say, "This block was taken out so late as January last, and was in the possession or under the control of the defendant. The withholding it then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on the tree," with the context; also the charge to the same effect on page 14 of the charge.

7th. As to that portion of the charge of the court contained on part of page 18 and on page- 19 and 20 relating to location.

8th. The third division of the general results of the charge as stated by the court on page 22 of the charge.

59 Defendant's counsel respectfully request the court to order the foregoing specifications to be filed of record, together with the charge.

T. H. PURDY,
S. P. WOLVERTON,
GEO. H. JENKS,
Counsel for Defendant.

Indorsed: No. 19. Nov'r term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Exceptions on part of defendant. Dec. 29, 1883. Filed by leave of court. By the court. Filed Dec. 29, 1883.

60 *Judgment Docket Entries.*

No.—19.
Term.—Nov'r.
Year.—1881.
Defendant.—Ira T. Clement.
Plaintiff.—Elisha A. Packer.
Date of judgment.—January 15, 1884.
Date of verdict.—December 29, 1883.
Remarks.—Premises.
Att'y.—J. W. Ryon.

61 In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Be it remembered that at the said term of court, No. 19, of November term, A. D. 1881, came the said plaintiff into the said court and impleaded the said defendant in a certain plea of ejectment, in which the said plaintiff claimed that the said defendant had in his actual possession a messuage and tract of land situate in Mount Carmel township, Northumberland county, Pennsylvania, bounded and described as follows: Beginning at a post 319 perches southward from the northwest corner of survey in the name of Mary Myers, dated October 2nd, 1793, being the southwest corner of the said Mary Myers tract, thence extending south 86° east 240 perches, more or less, to a post, the southeast corner of said Mary Myers tract; thence south 4° W. 60 perches to a corner; thence north 86° W. 240 perches, more or less, to a stone; thence S. 40° W. 33 perches to a stone; thence N. 86° W. about 40 perches; thence N. 61° W. 120 perches to the southern line of Charlotte Ruston tract, located
62 at the official distance from its northern line; thence along the said southern line of the Charlotte Ruston tract S. 86° E. 140 perches to the S. E. corner of the said Charlotte Ruston tract, and thence N. 40 E. 32.9 perches to the beginning, containing 120 perches, more or less, which the said plaintiff claimed was a part of a tract of land surveyed on the 22nd day of October, 1794, on a warrant to William Elliott, dated the 26th day of November, 1793, the right of possession or title to which the said plaintiff said was in him and not in the defendant, and the said defendant pleaded not guilty, and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at Pittsburgh, in the district aforesaid, before the Honorable William McKennan and the Honorable M. W. Acheson, judges in said court, on the 19th day of November, A. D. 1883, the aforesaid issue between the said parties came to be tried by a jury of the said court for that purpose duly empanelled, at which day came as well the said plaintiff as the said defendant, by their respective attorn*ies*; and the jurors of the jury aforesaid empanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel for the said plaintiff, to maintain the issue on the part of the plaintiff, offered evidence tending to show that the said plaintiff was
63 the owner of a certain tract of land situate in Mount Carmel township, Northumberland county, Pennsylvania, surveyed on the 22nd day of October, A. D. 1794, in pursuance of a warrant to said William Elliott, dated the 26th day of November, A. D. 1793, containing by official return of survey 368 acres and allowance.

And, further to maintain the said issue on the part of the said plaintiff, the counsel for the plaintiff offered — evidence the following warrants and surveys thereon :

1st. Warrant to Joseph Tyson, dated the 26th of Nov., 1793, for 400 acres of land lying one mile north from the road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's; other lands and survey thereon on the 22nd of Oct., 1794, for 453 acres and allowance calling on the southeast corner for William Elliot, on the south for Daniel Reese and Thomas Reese, Jr.

2nd. Warrant to William Elliott, dated the 26th of Nov., 1793, for 400 acres, adjoining lands granted to Cadwallader Evans, and survey on the same on the 22nd of Oct., 1794, calling on the west for Joseph Tyson ; on the north for Daniel Reese, Charlotte Ruston, Mary Myers, and part of John Reynolds; on the east for Lewis Walker; on the south for Jesse Brooks, Josiah Evans, and Sarah Lane.

64 Warrants to Lewis Walker for 400 acres and survey thereon on the 22nd of Oct., 1794, containing 371¼ acres and allowance, calling on the west for W. Elliott, on the north for John Reynolds, Thomas Billings, Mary Ruston and Thomas Ruston; on the east for Nathaniel Brown, and on the south for Robert Gordon, Peter Smith, W. Shannon, and part of Jesse Brooks.

4th. Warrant to Wm. Shannon, dated the 26th Nov., 1794, and survey thereon, dated the 22nd of Oct., 1794, containing 415 acres and allowance, on the west for Jesse Brooks, on the north for Lewis Walker, on the east for Lewis Walker and Peter Smith, on the south for Nathaniel Gilbert.

5th. Warrant to Nathaniel Brown for 400 acres, dated the 26th of Nov., 1793, and survey thereon dated 30 of Oct., 1794, for 400
65 acres and allowance, calling on the west for Lewis Walker, on the north for Thos. Ruston, Mary Myers, and John Young, and on the east for Ebenezer Branham; on the south for Andrew Porter and Robert Gordon.

6th. Warrant to Ebenezer Branham, dated 26th of Nov., 1793, for 400 acres, and survey thereon, dated the 21st of October, 1794, containing 441¼ acres, and allowance calling, on the north, for Joshua Bean, Samuel Lobdell, Daniel Reese, and John Huston; on the east, Steadman & Co.; on the south, Thos. Ruston, in right of Lewis Walker and Andrew Porter, and that all of the surveys purported to have been made by William Gray, deputy surveyor; and also offered evidence showing the payment of the purchase-money for all these tracts by Dr. Thomas Ruston.

The counsel for the plaintiff, to further maintain the issue on the part of the plaintiff, offered evidence showing that the northern line of the block of surveys known as the Brush Valley block, composed of eleven surveys, in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell, was well located on the ground in 1793, and tending to show that the division line between Thomas Billington and John Reynolds was also run at the same time, and that no line had

originally been run between the Brush Valley and Le Fevre blocks, and produce A. B. COCHRAN, a surveyor, as a witness, who,
66 being duly sworn, among other things, testified as follows:

Q. Have you been on the lands of a batch of surveys consisting of the Daniel Reese, Charles Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell?

A. I have.

Q. State whether you have made an examination of the lines of those surveys in connection with the surveys immediately south, known as the Lefevre lands, consisting of the William Elliott, Lewis Walker, and others.

A. I have; in the winter of 1881 and in the spring of 1882.

Q. State what examination you made and what you found to indicate the location of these surveys.

A. I ran all the exterior lines in the eleven tracts known as the Brush Valley lands. I found the northern lines well marked on the ground, counting back to the date of the survey, 1793. The lines correspond pretty well with the official courses and distances; sometimes the distances were a little bit long and sometimes a little bit short. I found the line between the Billington and the Reynolds counting back to the date of the survey, and on the western line of the Reese and the eastern line of the Lobdell, but along the entire southern line of the batch I found no original work—that is, no work of the deputy surveyor in 1793.

Q. In this batch of surveys, the eleven, do you remember
67 what are called for on the northern side for corners?

A. Yes, sir. Do you want the corners on each tract?

Q. No; you can state what they are.

A. They call for living corners.

Q. For timber?

A. For trees.

Q. On the southern side of the same batch of surveys, you may now state what are called for as corners.

A. With the exception of the southeast corner of the John Reynolds and the southwest corner of the Thomas Billington, which calls for a small maple, the calls for the other corners are posts.

Q. For posts?

A. Yes, sir.

Q. In making an examination on the southern side of those surveys you have said you found no marked line corresponding with the age of those surveys?

A. Yes, sir.

Q. State now whether that is a timber country and there is timber along this line where line ought to be.

A. Yes, sir; there is a good deal of original timber now standing there.

Q. State whether that timber was timber of a sufficient age to have been marked if the line had been run there?

A. Yes, sir; it was original timber; timber about the same age as that on the northern line.

Q. You have stated that you found one marked line between the John Reynolds and the Thomas Billington—two of those surveys—counting back to the age of the survey.

68 A. Yes, sir.

Q. Will you point out to the jury where that line is—line between the Billington and the Reynolds?

A. Yes, sir. (Witness complies with request of counsel.)

Q. Just say to the jury which line it was you found well marked on the ground.

A. I found this northern line well marked on the ground, and the cross-line between the Billington and the Reynolds.

Q. Mr. Cochran, tell the jury whether there is any other original work on this lot of surveys than this northern line and that cross-line that you found?

A. No, sir; there is no other original work.

Q. In the original papers state what is called for at that point.

A. Which point?

Q. The south end of that cross-line.

A. It calls for a small maple.

Q. State whether that small maple is the only living corner that is called for on the south side of that survey?

A. Yes, sir; it is.

Q. The rest are posts.

A. Sixteen corners, I believe, are posts, and one corner a small maple; there are seventeen corners on the south line.

Q. What does the call for post corners in the various surveys indicate in the estimation of surveyors?

A. It means that the surveyor wasn't there at all; it means that he made no corners.

69 Q. What distance did you trace that cross-line upon the ground?

A. We traced it from its northern line to the maple, and sixty or seventy perches beyond that.

Q. How far did you trace the marked line?

A. We traced the marked line—well, I can see this from what we found on the ground and from blocks in my possession—we traced is as far as the old maple or the old mark, about eight perches south of the stone corner, where Rockafeller found the original maple corner.

Q. Eight perches south? You mean eight perches north?

A. Yes, sir.

Q. Then you traced the old northern line of the survey to within eight rods or thereabouts of the place where you located the maple corner?

A. Yes, sir.

Q. At that point state what you discovered—what you found there—when you were there in 1881?

A. We found a stone corner with a chestnut oak stump about eight feet to the northwest that had been broken off and fallen over, burnt and too much decayed to make anything out of it. We found a chestnut witness about a perch and four-tenths to the southeast of

that that counted 29 years to the time that it had been blocked previously by Stroup and Lewis, and which was a witness made by David Rockafeller.

Q. Then from 1876 it counted back to when?

A. From 1876 it counted back to 1847.

70 Q. Showed then it was a witness made in 1847?

A. I determined that from the tree itself and from other evidence I have in my possession.

Q. At that time Rockafeller made a survey there?

A. Rockafeller surveyed there in 1847; I know from the marks of the ground.

By Mr. WOLVERTON:

Q. You never saw him there?

A. No, sir; I did not see him there in 1847. I found marks on the ground corresponding with the date of the survey made in 1847, and I had in my possession a map made by him and showing that he had made a survey at that time, and also his testimony showing that he had been there at that time. Eight or ten feet northeast of this stone heap we found a maple witness that had been cut down laying on the ground, with the maple sprouts growing out of it.

Q. State whether you have brought that maple witness into court.

A. I have that maple witness here; yes, sir; I cut a cane from one of the sprouts and used it as a cane in travelling through the woods.

Q. You have that here?

A. Yes, sir.

Q. That sprout that you cut off for a cane you say had grown up from a stump of the tree that had been cut down that was marked as a witness?

A. Yes, sir.

71 Q. You cut that in 1881?

A. Yes, sir.

Q. That spout in 1881?

A. Yes, sir.

Q. Did you count the growth so as to ascertain about——

A. I won't be certain whether we took them in 1881 or in the spring of 1882; my impression as to the time is that we did not discover this maple witness that had been cut down; I can tell, however, by referring to the notes; but it was either in December, 1881, or in April, 1882. (Witness refers to his notes.) It was in April, 1882—April 25—when we were there; in December we didn't notice the maple that had been cut down—the maple witness.

Q. What length of line did you find from the north line of these surveys to the place where you ascertained this corner to be the stone corner, as you call it now, the stones around some maple brush, or call it the maple corner for the purpose of designating?

A. We measured that line from the northeast corner of Reynolds' to the stone corner or the maple, as $322\frac{3}{10}$ perches.

By counsel for defendant:

Q. That is the maple?
A. Yes, sir.

By counsel for plaintiff:

Q. What was the official distance, or what is the distance called for by William Gray, who located those surveys?
A. 326 perches—in other words, the actual distance is 37 perches short.
Q. That is, within 3.7 rods of the line called for in the official survey?
72 A. Yes, sir.
Q. What is the character of the country across there from the northern line to the maple?
A. Well, it is steep and stony, and very rough.
Q. Goes down one hill and into the valley?
A. Yes, sir; the northern line of the Reynolds is on top of Little Mountain, and the south line of the Reynolds is probably two-thirds of the way up Big Mountain.
Q. Rocky country?
A. Yes, sir.
Q. That is a little short of the official distance?
A. Yes, sir.
Q. State whether you found the same discrepancies on the northern line, where the line is well marked and the corners marked.
A. Yes, sir; I found some of lines long and some of them short; I found one of the lines of the John Reynolds tract to be 104.2 perches and the official distance, I believe, is 110 perches.

By counsel for defendant:

Q. Which line?
A. One of the northern lines of the John Reynolds.

By counsel for plaintiff:

Q. That is much shorter line than this line?
A. Yes, sir.

By counsel for defendant:

Q. How much shorter?
A. I measured it; 104.2 perches was my measurement and 110 is the official distance. I found the northern line of the Mary Ruston, Jr.; the official distance is 201 perches and the actual distance 184.2 perches.

By counsel for plaintiff:

Q. About eighteen rods too short?
73 A. Yes, sir; it is nothing unusual to find the lines long or short in these surveys; there are other lines on this draft that show they are short and others that are long; for instance, the

east line of the William Shannon; on the west line of the William Shannon the official distance is 166 perches.

Q. We will come to that after a bit. State whether you were on the southern batch of surveys—the Elliott, the Walker, and the Shannon.

A. Yes, sir.

Q. The surveys that lie immediately south of this piece, point them out to the jury.

Witness complies with the request of counsel.

Q. State what examination you made there, Mr. Cochran, and what you found.

A. I run all the exterior lines of these tracts with the exception of the east line of the Nathaniel Brown.

Q. Just point out to the jury what line that is.

Witness complies with the request of counsel.

Q. What did you find upon the south side of those surveys on the ground?

A. I found trees counting to the date of the surveys in the name of Sarah Lane, Jesse Evans, and Jesse Brooks—that is, counting back to the fall of 1793.

Q. Just tell the jury now when, if you recollect, about the time these surveys were made down there—the Evans?

A. Surveyed on October 17th, 1793.

Q. How long after the Reese, and Ruston, and Reynolds?

A. Fourteen or fifteen days; the Brush Valley block was on the second of October and the Brooks, Evans, and Lane was on the 17th of the same month and same year.

74 Q. You found that line the north side of the Brooks and Evans and Lane marked on the ground?

A. Yes, sir; we counted three trees, counting back to the date of the survey.

Q. When you were on the north side of the Elliott, Walker, and Brown where they join the Reynolds, Billington, Myers, &c., in this northern batch, state whether you found any marks there to indicate whether the division lines between those two batches were ever marked on the ground.

A. I found no original marks.

Q. Mr. Cochran, state whether you are able to locate the Brush Valley lands—that is, the Reese, Myers, Ruston, and others, from the official papers and the marks actually found upon the ground.

A. I am.

Q. Then state to the jury where you fix the southern boundary of the Mary Myers and the northern boundary of the William Elliott.

A. I found the southern boundary of the Mary Myers at its official distance from its northern-marked line as shown on that map.

Q. Tell the jury what you found upon the ground that enables you to fix the location of that survey.

A. Well, I have stated that I found the northern line of that batch of ground counting back to the date of the survey; that I examined the eastern line of the batch and the southern line and the western line, but I discovered no original *work*; I therefore located the Daniel Reese, the leading descriptive warrant of the Brush Valley lands, from its northern-marked line, making its
75 southern line at its official distance, and then making the southwest corner 340 perches from its northeast corner. I found on the ground — I mean—that is, the western line of the Daniel Reese is 340 rods from its northwest corner. I located the Charlotte Ruston by its northern line to join the Daniel Reese, for which it calls, fixing the south line at its official distance from its northern-marked line.

By the COURT:

Q. What is the official distance?

A. The official distance of the western line of the Charlotte Ruston is 312 perches and the eastern line 339; there is an offset in the northern line of that tract; the western line is 312 perches and the eastern line 339.

By the COURT:

Q. What are the distances?

A. The eastern line of the Charlotte Ruston, 339, and the western line, 312.

Q. That line you spoke of—what is the length of that; you say you located it by running it the official distance; the division line between the Reese and the Charlotte Ruston—what was the length of that?

A. Well, I located the Daniel Reese——

Q. I understand that, but the division line between them—how long is that?

A. The division line is 312 perches from the northwest corner of the Charlotte Ruston to the southwest corner of the Charlotte Ruston, and 348 perches is the official distance of the east line of the Daniel Reese; it has no bearing on the line of the Charlotte Rus ton.

76 Q. Then the Charlotte Ruston—you made that line stop at the end of the 312 perches?

A. Yes, sir.

Q. Was that the marked distance?

A. Yes, sir; the Charlotte Ruston was located originally by the surveyor by protraction. Having located his north line and marked it, he protracted it on paper.

Q. How far did you run the Charlotte Ruston—the southwestern boundary?

A. I located it at 312 rods, the official distance; I located the Mary Myers in the same way, from its northern-marked line and the corners, fixing the south line at its official distance from the northern line, the western line being 319 perches and the eastern line 341

perches; I located the John Reynolds from its northern-marked line and corner joining the Mary Myers, for which it calls, fixing the southwest corner at 300 perches, the official distance, and the south east corner at the store corner found by David Rockafeller in 1847, which is 3.7 perches short of its official distances.

By counsel for plaintiff:

Q. In locating the Mary Myers so as to give it all the land that the official survey calls for, state where the land in controversy in this suit is located. In other words, locating it as you did, where does it leave the land in controversy in this suit?

A. It leaves the land in controversy entirely outside, or south.

Q. Just show the jury on that map where the pieces of land is.

(Witness complies with request of counsel.)

77 Now you have gotten down to the vicinity of this maple corner, just show to the jury—you stated you found a maple there that had been cut down, marked Witness?

Here the witness produced the maple.

A. I found this three-notched witness marked in that way, with three notches; this maple stood about eight or ten feet northeast; this has been marked with three notches at one time—one here and another there and one here. The witness to a corner is marked in that way. This had been cut down and was lying on the ground about eight or ten feet northeast of where Mr. Rockafeller found the maple corner in 1847.

By a JUROR:

Q. What is supposed to be the age of that tree?

A. I made no attempt to count it accurately, but the tree is about fifty years old. The growth is so fine it is difficult to count.

By counsel for plaintiff:

Q. This is not supposed to be the witness?

A. No, sir.

By a JUROR:

Q. How do you account for the tree being no larger than that—fifty years old?

78 A. The ground on which it is growing is very stony and rough; there is no ground to support it. You can get at the age approximately with the aid of a glass, counting the annual growth. I can't count it, but that is my best judgment; it is fifty years of age.

By counsel for plaintiff:

Q. Tell us what those marks are that are shown there.

A. These are the witness marks; that (pointing) is not a mark.

Q. Explain to the jury what is understood among surveyors by a witness.

A. A surveyor marks a tree in three notches in the direction of a corner, and — is a pointer; it will be any place near the corner and pointing towards it. It is marked for the purpose of marking the corner, and it is generally done by surveyors if they find the original corner decaying; they mark the trees around it to per-tuate it—build stones around it if it is a stump, making a stone corner.

Q. State whether you got the stump from which that was cut.

79 A. Yes, sir. (Witness produces the stump.) This is the stump from which it was cut and taken by Prof. Wm. Roberts and Jonathan Wright, about two weeks ago.

Q. State whether the stump was standing there or whether it had fallen down.

A. The stump was standing there in its position, and either Prof. Roberts or Mr. White pushed it over; and Mr. Roberts wrapped it up in a newspaper and carried it to Pottsville.

Q. Were you along?

A. Yes, sir; that was on the 8th of November.

Q. State if you attempted to count that little maple and get at the age of the tree.

A. We tried to do it roughly, and conclusion was we couldn't count it accurately at all, but after going over it several times our impression was that the tree was in the neighborhood of 50 years of age, and that was the judgment of half a dozen surveyors and other men who were in the habit of counting trees. We were acting together. I will say this—that I cannot tell you how old the tree is, but my best judgment is from 45 to 50 years; it may be older or younger.

Q. State whether these persons you referred to, that were with you from time to time when you attempted to count that tree, are here.

A. Those gentlemen are here.

80 Q. State whether you took blocks or a block from the cross-line between the Billington and Reynolds.

A. Yes, sir; we did.

Q. Where did you get them?

A. I have a block here taken from a pine—a yellow pine tree—the pitch pine, as we call it sometimes—on the line between the Billington and the Reynolds, 99½ perches north of the maple corner. The blocks are identified with the initials of the surveyors who were present when the blocks were taken.

Q. What persons were along when the blocks were cut out of that cross-line?

A. William P. Mitchell, W. M. Chatham, W. A. Eddebron, R. M. McCullough, R. J. McCaffrey—Robert McAdams was the axeman—in addition to the chainmen.

Q. When was that done?

A. The block was taken on the 25th of Ap'l, 1882.

Q. What should that count to count to the date of the survey of the cross-line?

A. The survey was made in 1793, in October; the blocks being taken in April, 1882, it should count 88 years, and I will state that it does count 88 years.

81 Q. Mr. Cochran, is there any doubt at all that that fixes the age of the cross-line?

A. Not a particle, sir; but in addition to that I have other blocks.

Q. State whether that agrees with the old marked line on the north side of these surveys.

A. The same date.

Q. Just count it to the jury and explain how it is done.

Witness complys with request of counsel.

I hand you another block; state whether you have examined it.

A. I have, sir; yes, sir.

Q. That comes from the hemlock, a short distance from the maple wood?

A. This block was taken from a hemlock by George B. Stump and Charles M. Lewis, both surveyors.

By counsel for defendant:

Q. You were not along?

A. No, sir; Mr. Stump and Lewis were, perhaps, together. I have had the block in my possession and I identify his handwriting. I wasn't there with Mr. Stump.

Q. How far was it from the corner?

A. It is found—the hemlock—eight perches north of the corner.

82 Q. Eight perches north of the corner as found by Rockefeller?

A. Eight perches north.

Q. Of the pine, where he alleged he found the corner?

A. Yes, sir.

By counsel for plaintiff:

Q. When you was on the ground state whether that mark was living or dead.

A. The hemlock was dead.

Q. Did it have the appearance of having been dead some time?

A. It had the appearance of having been dead a few years.

Q. State whether you found evidence on the block—Rockefeller's mark or line, as it is called.

A. Yes, sir.

Q. Tell the jury when that block purports to have been taken from the tree.

A. I will read Mr. Stump's identification: "Block from the line of the John Reynolds and T. Billington. From hemlock, 313.2 perches from the northeast corner of the John Reynolds. Cut from the tree July 7, 1876, by Charles M. Lewis and George B. Stump, and counts 83 years, including this; 54 years to the former block. The tree is dying."

83 Q. Now, state whether you have counted the mark—that is, the younger mark—upon that block of 1876, when the block was taken from the tree.

A. Yes, sir.

Q. Tell the jury what you make it.

A. This block shows that from the first mark to the time it had been opened or blocked that there were 54 growths.

Q. That is, from the original mark to the younger mark it shows 54 growths—54 years?

A. From there out the young marks counts 12 full growths and a partial growth for the year 1876. The block having been taken in July, it wouldn't register a full growth; the growth would not be completed until about the middle of August.

Q. When, then, did you make the young mark on that block?

A. I say the tree was blocked in 1847, in the fall.

Q. That was the time Rockefeller was there, you understand?

A. It corresponds with Rockefeller's survey.

Q. Did you find other marks, counting from 1847, in that line?

A. Yes, sir; we opened one or two trees counting from 1847 on that line.

Q. Showing that somebody was there?

84 A. Showing that a survey had been made there in 1847.

Q. Mr. Cochran, will you take your field notes now and state to the jury what living trees you found—old marked trees—on the northern line?

A. I have them marked in this map. I will state this, there were a good many trees on that line which were original trees which we didn't block or count, because we considered we had sufficient to establish it.

Q. Mr. Cochran, state whether you have examined the original surveys to see what is called for on the north of that line; state whether it calls for vacant land.

A. The Reese calls for vacant land; the Reynolds and the Ruston, the three Rustons, the Young, the Bean, and Lobdell call for vacant land on the north.

Q. What is the call on the east of the Lobdell, which is the last of that batch of eleven surveys?

A. Calls for vacant land.

Q. What is the call on the south?

A. The call on the south is for vacant land.

Q. Then state whether, from your knowledge of the official surveys that had been put in your hands, there were any surveys on the north of this line or any surveys adjoining the Lobdell in the

85 west or any surveys in the south of this batch of 11 surveys at the time these surveys were marked on the ground.

A. There were no surveys adjoining these on either the north, south, or east; the official returns call for vacant land on these three sides.

Q. You have had occasion to examine those northern surveys?

A. I have examined the official drafts.

Q. And they are, in point of fact, there?

A. Surveyed — 1794.

Q. State, then, whether there is sufficient work on the ground—marks on the ground—to enable you to definitely locate these 11 surveys.

A. There is.

Q. State, then, whether the location which you have made, and to which you have testified, of these surveys, lying west of the old line running down to the maple corner, gives to these surveys all the line called for in them, and whether the location is in accordance not only with the official returns but with the marks upon the ground.

A. The location is in accordance with the official returns and with the marks on the ground, and each tract has the quantity returned by the deputy surveyor, with six per cent. allowance for roads.

86 Q. Did you run any other cross-lines than those which you have mentioned?

A. I did not; I ran the eastern line of the batch and the western line of the batch—that is, the east line of the Lobdell and the west line of the Reese—in additon to the line between the Billington and the Reynolds, but these three lines constitute all the work I done north or south.

Q. For the purpose of ascertaining division lines?

A. Yes, sir.

Q. State whether the official work shows, in your judgment, that these cross-lines were run, with the exception of that between the Billington and Reynolds.

A. The official draft shows very plainly that the work done upon the ground by the surveyor was the northern line, and the line between the Billington and Reynolds.

Q. State whether you have made a map of the work you did there.

A. I have.

Q. I show you a map; is that it?

A. Yes, sir.

(Here the map was marked Exhibit A, November 23rd, 1883, W. A. S., for identification.)

87 Q. Does that correctly show the work you did?

A. It does.

Q. On the south of these surveys—that is, the Shannon and Elliott, and so on—that you have stated that you were on and what you found there, how do they correspond with the official return—that is, the actual location of these surveys upon the ground?

A. I found trees on the line of the Sarah Lane, Evans, and Broks which counted back to the date of surveys. The Elliott calls for these surveys. I found nothing but a small little stone; no original corner. I found a pine stump and a stone for the southwest corner of the William Shannon; it I adopted, because I knew by reputation that it was the original corner, and that it had been found by David Rockefeller, and was noted on his map, and testified to in other suits. There is nothing there but some stones, and it is the recognized corner of the William Shannon; it is 21.3 perches short of the official distance.

Q. You found that 21 and some odd rods short of the official line?

A. 21.3 of its official distance.

Q. North and south?

A. Yes, sir.

Q. How was it in length?

88 A. I measured the south line; — was 396.5 perches and the official distance is 424 perches, being 27 rods too short.

Q. How did you find its location relative to other tracts—its official location relative to other tracts—that were located to locate their marks on the ground?

A. I found the Shannon is about 200 rods further west than it appears on the official draft. There is an error in that some place there.

Q. Have you a map which shows its official connection and its actual connection?

A. Yes, sir.

Q. Explain to the jury how it is.

A. This (referring to map) is a copy of the official draft. Here is the location of the William Shannon, the official, and this the location of the William Shannon, actual; in other words, it is 200 rods further east, or the Brush Valley lands are 200 rods further west—that is, the relative position of the Brush Valley tracts on the ground is not as it is on the official drafts.

Q. Just explain to the jury, locating this in here (pointing),

89 taking the Elliott or the Lewis Walker and the Shannon, and state whether the surveyor ran a new line for them or whether he adopted the old lines that he had run and located it upon the old work.

A. This line is run on the Evans and the Brooks, and when the surveyor located the Elliott he adopted that line and called for it.

Q. State whether in consequence of that he made any marks upon the Elliott.

A. He made no mark.

Q. Then you explain the discrepancy here as a result of a mistake in calculating the distance?

A. Yes, sir; the Jesse Brooks is located further east or these were located too far west; one or the other.

Q. In consequence of that you find this point actually upon the ground down here (referring to map)?

A. I found that; yes, sir.

Q. State whether you found more or less living corners in the north line.

A. On the north line of the Brush Valley?

Q. Yes, sir.

A. Oh, yes; found sufficient to establish that line beyond any question; some of the original corners were gone, but there are new stone heaps; living trees were called for, but there is no dispute about it.

90 Q. State to the jury where the Petrie surveys are located. You have got a map; give us the location of them, and point out to the jury where they are located. (Here another map was handed to the witness.) I want you to state to the jury where the two Petries are located—John and Peter.

A. John Petrie is located principally south of the Mary Myers and Charlotte Ruston tracts; its southern line corresponds with the north line of the William Elliott and its northern line interferes slightly with the Myers and Ruston and with the Reese. Locating the Ruston, Reese, and Myers as we locate them, the John Petrie warrant the first of January, 1830, surveyed on the 12th of January, 1830, and the Peter Petrie is located immediately east of the John Petrie. Its southern line conforms to the south line of the Elliott and the south line of the Walker and interferes slightly with the Myers and extends eastward; there is two offsets.

Q. Then it interferes slightly with the Myers, according to the location as you made *made* it?

A. Yes, sir; according to the location I have testified to.

Q. State whether either or both of these surveys covered any of the land in dispute.

91 A. Yes, sir; they cover it almost entirely.

Q. Which one?

A. The John Petrie covers the most of it, but the northwestern corner of the Peter Petrie covers a small quantity; then there is a small triangle where the southwest corner of the Mary Myers joins the Charlotte Ruston, which is in controversy, which is not covered by the Petrie.

(Here the map handed to the witness was marked "Exhibit B, November 23d, A. D. 1883," W. A. S., for identification.)

Cross-examination by S. P. WOLVERTON, Esq.:

Q. The line that you run and the official distance line for the southern line of the Brush Valley block of surveys is the line between the Le Fevre block of surveys and the Brush Valley block?

A. Yes, sir; that would constitute the line between the two blocks.

Q. The question in this case is the true location between the Le Fevre block, the survey line, and the Brush Valley block; is that as you understand it?

Objected to.

Q. Were you instructed to establish by your survey the line between the Le Fevre block and the Brush Valley block?

92 A. I was instructed to ascertain the true location of the south line of the Brush Valley lands, which would also be the north line of the Le Fevre lands.

Q. Now, sir, as a surveyor, when you locate a block of surveys on the ground you locate them as one tract?

A. Block of surveys?

Q. Yes, sir.

A. If they were surveyed as a block I locate them as a block.

Q. And a mark found upon any of the block of surveys if surveyed as a block is a mark for that whole block?

A. I believe that is the decision of the courts of this State.

Q. Is that not the practice of surveyors and the law as you understand it?

A. In certain cases; yes, sir.

Q. Is not it always the case that where certain tracts have been surveyed upon the ground as a block if you find any mark upon any one tract it is a mark on the whole block?

A. Yes, sir; if they have been surveyed as a block.

Q. I ask you whether, as a surveyor, from your experience that is not the proper way to locate a block of surveys.

93 A. I say in answer where they have been surveyed as a block that would be the proper method.

Q. Do you know as a surveyor what constitutes a block?

A. I understand a block to be those having the same areas—that is, after the warrant issued and a survey had of the same, by running the exterior lines and leaving the interior lines to be determined by the owner himself.

Q. It would not necessarily be as a consequence of its being a block that the interior line should not be surveyed?

A. No, sir.

Q. Is it not a frequent occurrence in your experience as a surveyor that the interior line of the block of surveys are not upon the ground?

A. Very frequent; where the block has been surveyed as one tract the surveyor was not upon the interior lines at all.

Q. In 1793 William Gray or his assistant was on the southern line of the Brush Valley tract?

A. At the maple corner only.

Q. So far as you found?

A. So far as I found and the official papers indicated.

Q. Certainly he was on the Brush Valley lands?

A. Yes, sir.

94 Q. If the true location of that maple would be found that would establish the whole southern line of that block?

A. Yes, sir.

Q. If that corner would be established by testimony, then you would start to locate the southern lines of the Brush Valley block by locating from that corner east and west by its courses?

A. Yes, sir.

Q. This Brush Valley block has its northern line on Little Mountain and its southern line on Big Mountain?

A. Yes, sir.

Q. Is there not between these two mountains a deep ravine and a stream running through it called Roaring creek?

A. Yes, sir.

Q. The northern side of Big Mountain is very rugged and rocky, is it not?

A. The north side is very rugged and rocky.

Q. It is almost impossible in any place to climb?

A. Yes, sir; the north side is very rocky.

Q. In places it is almost impossible for a surveyor to chain over?

A. It is very rough ground to chain over.

Q. And it is also rough on the south side of Little Mountain?

A. Yes, sir; rough and stony.

95 Q. So that its courses and lines, if it had been run, would be run down the south side of this Little Mountain through this ravine and up the side of Big Mountain?

A. Yes, sir.

Q. The surveyor in 1793, you think, did not survey the interior lines, but surveyed it in blocks and avoided climbing; they didn't run up the mountains at that time?

A. Yes, sir; they ran up mountains at that time.

Q. Will you please tell us why you ran at the end of the official distance from the northern line of the Daniel Reese, the southern line, and of the Charlotte Ruston from the northern line, the official distance to the southern line, and then changed your course to come down to David Rockefeller's maple sprouts?

A. Yes, sir.

Q. Why didn't you keep on your official course if it is proper to locate at the end of official courses and distances?

A. I understood it to be necessary to locate a batch of surveys by its leading descriptive warrant, if it can be located by marks
96 on the ground. The Daniel Reese can be located from its northern line just as the surveyor located it in 1793; then by protraction or measuring on paper to fix the southern line and to fix the distance, so as to give the given quantity returned; then the next warrant, its northern-marked line, answers it- call for the Reese, and so on to the next, and from that to the end; and, although the maple corner is 3.7 perches short of the official distance, the marks on the ground and the evidence of other surveys, and one gentleman who saw the maple and some who saw the chestnut oak and the witnesses, counting back to the time of survey, they all convince me that was the original point, and that is why I adopted it.

Q. Then why didn't you start at this point, which is alleged to be the original corner, and locate east and west from that, if you are satisfied that the corner was found?

A. For this reason: There is no material difference in either of the locations. The location I made locates more favorably for the parties you represent than the other.

Q. You were not there to locate for us?

A. No, sir; but we give the official distance to answer the evi-
97 dence of certain parties, and it is exactly according to the distance of other surveyors. I adopted that taken in this case; in other words, the maple corner is at its official distance.

Q. Didn't all the other surveyors, some of whom are dead, fix the maple sprout 8 rods short?

A. Some of them did and some at its actual distance.

Q. Do you know what Straup fixed it at?

A. I think Straup was 5 or 6 perches short.

Q. Didn't you know that he fixed it at 7.5 rods from its official distance?

A. I cannot tell.

Q. You have his map in your hand?

A. Yes, sir: his map don't fix it except by scale.

Q. If David Rockefeller's corner is the true corner, is not that the proper place to fix the south line of the block by running from that spot?

A. I couldn't tell; I think the method I have give- would be the proper location; then would go to his call for its proper location.

Q. Haven't you stated that if that tree could be found the proper method would be to run the location the official distance from that spot?

A. Yes, sir; but both are practically the same.

98 Q. Two lines cannot be the same. Which is correct? Suppose that the David Rockefeller corner wasn't there, how would you locate the southern line?

A. I would locate each of the southern lines from the northern.

Q. Would you abandon the courses east and west and go to his official distance?

A. No, sir; the course that is required to do that would not have more variation in it than we find in some of the other lines.

Q. Then, if I understand you, if the tree stood there and you started your compass with William Gray as he stood there, and run going west, you would change your line for no other reason than pure benevolence for the other side?

A. No, sir; I contend that *the* both lines are practically the same; that some surveyors measure across that valley, which is rough and rugged, and have a discrepancy of two or three perches, can be easily accounted for.

Q. It is not because you know the maple sprouts are short the official distance that you go back?

A. The maple sprouts, according to my measurement, are short.

Q. How did you measure it accurately?

A. We measured it with a two-perch chain.

99 Q. Did you level your chain?

A. Yes, sir; going down the mountain the man held the front end up, and going up he held the hind end up.

Q. The man simply held it up?

A. Yes, sir,

Q. Did you plumb it?

A. No, sir.

Q. Did you get it as near accurate as you possibly could?

A. I cannot say that; we done it as near, in my judgment, as any of the surveys of William Gray; that is my belief.

Q. You levelled the chain?

A. Yes, sir; the chainman held the chain up going up the mountain; that made it horizontal; and coming down the mountain the front end was held up in his hand; whether it was held sufficiently level to give accurately the measurements I would not say.

Q. Who were your chain-carriers?

A. Charles Strauch, I think, was one—a man that had been accustomed to that sort of work.

Q. What tracts constitute the Le Fevre block?

100 A. The William Elliot, the Lewis Walker, the William Shannon, and the Nathaniel Brown.

Q. Why is it that in your maps you have not put the Ebenezer Branham in that block?

A. Because it was not claimed by the parties for whom I surveyed; at least, I understood it was not.

Q. Do you know that the Ebenezer Branham is one of the Le Fevre block of surveys?

A. I understood the Ebenezer Branham was not one that was run at the same time.

Q. Had you the official papers at the time you ran the line?

A. Yes, sir.

Q. Had you the application, the voucher, blotter, and all?

A. I hadn't the application, voucher, and blotter; I had the official warrant and the surveys.

Q. They were all surveyed at the same time?

A. I know they were returned as having been surveyed on the 21st of October, 1793—21st and 22nd.

Q. William Gray returns that he surveyed these at the same time?

A. Yes, sir.

101 Q. There were six tracts in the block?

A. Those tracts are Chambers' surveys, Mr. Wolverton; you can designate them as a block.

Q. Don't you know the Branham is the leading warrant of the Le Fevre block?

A. It is the leading warrant of that batch of surveys.

Q. Then the Branham, to show the whole block, should have been put upon your map?

A. If you want it to show all the surveys, it ought be on the map.

Q. But you cut it short at the eastern line of the Samuel Lobdil?

A. I don't know what we did; I think some of our own maps show it.

Q. Havn't you made some that has not got it on?

A. Yes, sir; I made some without.

Q. You stated you run all round the Le Fevre block; did you run all around the whole block or only certain tracts of the block?

A. I stated that I run all the lines that were on that map, with the exception of the east line of the Ebenezer Branham—that is, all that was shown on this map, with the exception of the east

102 line of the Nathaniel Brown.

Q. Is there anything on these maps to designate, from an inspection of the maps, what lines you ran and which you did not?

A. Yes, sir.

Q. How are the lines that you ran designated on these maps?

A. The full lines; the lines not run dotted lines.

Q. The dotted lines are lines you didn't run; the full lines are lines you actually surveyed?

A. Yes, sir.

Q. Then, I understand, you have not surveyed the whole of the Le Fevre block?

A. Yes, sir; I have.

Q. Did you survey the Branham?

A. Yes, sir.

Q. What does the Branham call for on the north? Just give us the calls for the Branham all around.

A. The Ebenezer Branham calls for the Joshua Bean on the north; and the Samuel Lobdil, the Daniel Reese adjoins the Houston; on the east Steedman and Co., on the south Thomas Ruston and, I think, the Lewis Walker for the Andrew Porter; on the west there is no call.

Q. What monuments does it call for on the north?

103 A. Calls for a small chestnut and calls for a post by a pine; all the other corners are posts.

Q. Was the corner, the post by the pine, made at the time of the Branham survey, or was it adopted from surveys previously made?

A. It was a corner adopted from surveys previously made.

Q. Do you know of the corner that is the post by the pine?

A. Yes, sir; a corner on the Francis West—that is, there is no post by the pine there, but the place by reputation I know it.

Q. There are surveyors living and in this house who saw the corner there?

A. That I do not know whether they did or not, but there is the place there.

Q. Do you know what the southwest corner of the Francis West survey calls for?

A. It calls for a post by a pine.

Q. What does the southeast corner of the Richard Martin call for?

A. It calls for the post by the pine.

Q. And at this angle in this Ebenezer Branham, there is a call, where there is a change in the course, for the post by the pine?

A. Yes, sir.

Q. So that is called for by the surveyor for three surveys as a point—by the Branham, the West, and the Martin?

A. Yes, sir.

104 Q. And a well-recognized corner?

A. Yes, sir.

Q. I- calls for the Houston; do you know where the Houston is?

A. The Houston lies east of the West.

Q. Just 23 days before Wm. Gray returns that he located the Brush Valley block of surveys he returns, under oath, that he run the Francis West on the ground, and the Houston?

A. I believe he did.

Q. Did you run the lines of the John Houston and the Francis West?

A. No, sir; except the west line of the Francis West, which forms a portion of the south line.

Q. How much of the southern line?

A. I run 110 rods, I believe, to where the northwest corner of the Ebenezer Branham was.

Q. Do you know that the Francis West survey and John Houston survey are both well established by original monuments on the ground?

A. I understood them to be; yes, sir.

Q. And the first surveying that was *the* done by William Gray on that neighborhood for miles around was the location of the Francis West and the John Housten, except a little survey east of it?

105 A. No, sir; he surveyed, in connection with that batch, the John Adam Gilger.

Q. That is some seven miles beyond what I am talking about—the eastern end and in this neighborhood?

A. It was a survey made prior to the Brush Valley. There were older surveys east.

Q. But in this neighborhood the first vacant land that was appropriated and taken up were the two tracts of John Houston and the Francis West?

A. They were taken up prior to the Brush Valley, some 23 days

Q. So that before he went to locate the Brush Valley block he had been there and located the lines of the Houston and West and marked the posts and corners?

A. I wouldn't like to say that William Gray had.

Q. He or his assistants, by his authority?

A. Yes, sir; his deputy; one deputy might have located the West and another the other way.

Q. Then he had fresh marks made by him 23 days before as some guide to locate these warrants that he had in his hands?

A. Yes, sir.

106 Q. He had at the time that he located the Francis West *he had* not located the lines of the Evans or the corners of any of these tracts south of the Le Fevre block?

A. No, sir.

Q. He hadn't located the Brush Valley block?

A. No, sir.

Q. So he had fresh marks that he had put there, and there are abundance of them on the West and Houston, in that valley?

A. H- could have started there.

Q. Were they not the only fresh marks in that neighborhood that you know of?

A. At the eastern end?

Q. At the eastern end.

A. Yes, sir.

Q. And the Gilger, at the western end—with it the Daniel Reese interferes or it interferes with the Daniel Reese—was made in 1789?

A. Made a few years prior. The marks would be fresh.

Q. Did you run the whole eastern line of the Francis West?

A. I did not.

Q. The western line?

A. Yes, sir.

Q. Did you run — north—that is, the northwest—corner of the Francis West and continue on up the eastern line of the Richard Martin?

107 A. Well, I run it the other way.

Q. You have, then, run the north line of the Richard Martin and its eastern lines?

A. Yes, sir.

Q. And you found both of them well marked on the ground?
A. I did not.
Q. What did *did* you find?
A. I found trees that had been testified to by parties before, but were destroyed.
Q. They were blocked by surveyors and could not be counted in any other——
A. They were destroyed.
Q. They were destroyed by time or being marked by surveyors on either side?
A. No, sir; my idea is by fire, heavy fires.
Q. You saw where they should have been?
A. No, sir.
Q. Fires do destroy trees on that mountain?
A. I found several of the Francis West—that is, the western line.
Q. A few years ago there was sufficient marks to locate a line on the Richard Martin?
A. I have no doubt about it.
Q. When you came to examine it in 1881 you found no original marks?
A. I found where the original marks had been, with the exception of one pine tree on the Francis West and the Richard
108 Martin line that we were able to count back.
Q. The Richard Martin survey was made in '94?
A. Yes, sir.
Q. How long was that after the other?
A. They were made on the 2nd and 3rd of October, '93, and the Richard Martin on the 22nd of February, '94.
Q. Then the survey of the Houston and West was made on Sept. 2nd and 3rd, 1793, and the Brush Valley tract on October 2d and 3rd, '93, as returned?
A. Yes, sir.
Q. And February 23rd, '94, the Richard Martin was surveyed?
A. Yes, sir.
Q. What does the Richard Martin call for on its northwest corner?
A. It calls for the pine.
Q. Did you find that pine to exist?
A. No, sir.
Q. From the surveying you did upon the ground have you any doubt of the proper location of the northwest corner of the Richard Martin?
A. No, sir.
Q. What distance is there between the northwest corner of the Richard Martin and the southeast corner of the post by a pine?
A. Well, there are two lines there.
109 Q. I am asking the distance from the northwest corner of the Richard Martin to its southeast corner.
A. Well, there are two lines there; one line 78 perches and the other 282.

Q. What is the length of the eastern line of the Richard Martin? That is what I want.

A. Do you mean the actual or the official?

Q. The actual and official; what you found upon the ground.

A. The eastern line of the Richard Martin consists of two lines; the first line officially is 80 rods, actually 78, short two rods; the next line of the Richard Martin is 250 rods official and 282.5 actual by our measurement.

Q. And the total length of the eastern line actual?

A. 360.5 perches.

Q. And the total official length?

A. 330 rods.

Q. What is the excess on this line—that is, the actual line upon the ground?

A. The excess is 30.5 rods.

Q. If I were to ask you to locate upon the ground the Ebenezer Branham survey how would you do it? It calls for a post by a pine and the chestnut oak on the south.

A. I would locate it by its marked lines and by its calls.

110 Q. Where would you start to locate it?

A. I would first locate its older surveys and then locate and answer those calls; if there were no marks of the older surveyor which interfered or which fixed the lines I would locate it by the marks upon the ground.

Q. You have two monuments of the lines of that tract which the surveyor in 1793 adopted, the first by the pine or the chestnut oak, the northwest corner in 1794; would you start on the northwest corner of the Branham to locate it?

A. I- would not be material where I would start.

Q. You would start at some known monument?

A. No, sir; I would first locate the older surveys — were on the ground, fix that location, and where there were no lines then I would locate by its calls; in other words, the post by a pine would fix the lecation of the Ebenezer Barnham at that point to the south line of the Lobdil, located 320 rods from its northwest line; would fix the northwest line of the Barnham there.

Q. Suppose you started the northeast corner of the Barnham at the chestnut oak, then running the official course of the surveyor of 1794 you struck the post by a pine?

111 A. That is, starting from the chestnut oak.

Q. From the chestnut oak, then, you have two monuments to go by; wouldn't you then, from a post by a pine, having the monuments for that tract, run the official course westward for the northern line?

A. I would, so far as that line was marked.

Q. How far would you run that, having the two monuments; how far would you follow it?

A. I would follow it 150 rods.

Q. Why?

A. At that distance I find a pine corner, which is the end of the survey on there, and I would come to the south line of the Lobdil.

Q. What is the official length of the southern line of the Richard Martin?

A. The official length is 308 rods.

Q. So that the 150 perches, notwithstanding that William Gray returned under oath in 1794 that he made a straight line all along the south of the Martin and clear to as far as the Joshua Bean, you would turn off to change its course?

A. Yes, sir.

Q. What course would you run there?

A. I would run the course that was necessary to answer
112 the call of the older survey, for this reason: I know of no law or fact that will permit lines of a younger survey to change the lines of older ones. I am fixing the Branham, and by the older one.

Q. I am asking you now to locate without reference to the Brush Valley blocks at all. I am asking you to locate the Branham survey by its monuments.

A. Without regard to its calls.

Q. Yes, sir; locate by its monuments.

A. If it has no calls or marks on the ground I would have to locate it by its official course and distances. If there were no calls for older surveys I would continue the line as you state.

Q. Do monuments control calls?

A. Yes, sir.

Q. So that if you found there marked trees in the line corresponding to the official line as far as the deputy surveyor had made it——

A. I would follow it so far as the deputy had marked it on the ground, and when I found the end of his line clearly—when I found the original timber from that pine westward old enough to register the marks, and found he hadn't been there, I would certainly, in case of a younger survey, go to the calls of the old one.

113 Q. So that the monuments on the north line of the Branham would only control you as a surveyor, although a straight line is called for, for the actual length you found upon the ground?

A. The monuments on the ground would only control me where his monuments on the ground were made in 1793.

Q. I- 1794 the surveyor made this survey. Would you expect to find all the monuments on the ground made by him nearly ninety years ago?

A. No, sir; but where the original timber was standing as thickly as on this line I would certainly find some if he had been there. Besides, he marked the end of his line by a corner.

Q. Do you know there are no original monuments found, except on the northern line of the Branham; that there are two trees and on the line of the Joshua Bean two trees in the line bearing date?

A. I know there are trees in line that will bear date of the original.

Q. Did you say that within one degree of the courses north or south of the official course of the Ebenezer Branham from the trees that should have been marked and bore the date of the *date of the* survey along the whole of that line——

A. I say this: I doubt if any surveyor can run a line
114 within, and that there is *a* sufficient timber on the land to mark the line if it was ever run.

Q. Did you ever run the northern line of the Branham through its official distance from the whole of that tract?

A. Yes, sir.

Q. At the southwest corner of the Daniel Reese your are among the rocks in such a position that there is no chance for timber at all?

A. You mean the southwest corner?

Q. Of the Martin. It is not among the rocks and stones, barren of timber?

A. No; the south line of the Martin is on pretty rough ground; there is no doubt about that. I want to say this in speaking of this line of original timber: We found a good deal of the original timber all through there where the line would be located at its official distance.

115 Afternoon session.

ANDREW B. COCHRAN resumes the witness stand and cross-examination by Mr. WOLVERTON, as follows:

Q. Mr. Cochran, when court adjourned you were giving *you were giving* your views as to the proper location of the northern line of the Branham, going from the post by pine, which was the common corner of two surveys and recognized by the Branham westward on the line between the Branham and the Martin. How many marked trees did you find bearing date to one or the other of these surveys south of the Martin and north of the Branham?

A. I found a chestnut oak 39 rods west of the "post by pine" which counted 87 or 88 years.

Q. To what year?

A. I was not able to count the tree exactly; if it counts 88 it would count to the date of the Martin; if it counts 87 it would count to the date of the Branham.

Q. A tree there marked for the Branham or the Martin?

A. Yes, sir. I was not able to count it.

Q. Go on.

A. I found another tree, the pine corner, at the end of 150 perches. It is a very difficult tree to count, and the best I can do is to
116 say it counted from 86 to 88 years; that would be from 1793 to 1795.

Q. Your opinion, then, is that the tree, the yellow pine—is pitch pine—there at the end of 150 perches westerly from the post by a pine was marked either for the Martin or the Branham?

A. My impression is it was marked and adopted for the line of the Martin; it was marked prior to the Branham location.

Q. It was marked for the Martin prior to the Branham location?

A. I did not say that exactly. I said marked and adopted for the Martin.

By Judge LYNN:

Q. Is that the corner tree that you spoke of?

A. I don't think the corner tree was adopted for anything; I think it was the end of the survey; I think the line was marked prior to the location of the Branham.

By Mr. WOLVERTON:

Q. I am asking you what trees you found?

A. I found the chestnut oak I have testified to and a pine corner.

Q. Corner of what?

117 A. I don't know.

Q. How was it marked?

A. It was marked with notches on four sides.

Q. Do you block those notches?

A. Yes, sir.

Q. Did you find that they counted to 1824 only?

A. No, sir; I found that it counted to the same date as the other line of the survey.

Q. To what year?

A. 86 or 88 years; I counted both on the north side and east.

Q. 86 to 88?

A. Yes, sir.

Q. You could not count it within two years?

A. Not to be positive.

Q. From the time you were making this examination you counted back to what year?

A. 1793 or 1795.

Q. Then it must have been marked either when the line was run for the Martin or the Branham?

A. No, sir; I don't say that; I had my own idea how it was marked; if you ask me that question I can answer it.

Q. I ask you how the marks were; you say, Marked on four sides.

118 A. Yes, sir.

Q. Blazed or notched?

A. Notches.

Q. Is there any survey at that point that calls for a corner?

A. None that I know of.

Q. Does not the Sharpless corner at that pine?

A. It probably does; it is marked as a witness to a younger corner standing half a perch or a little more to the northeast.

Q. Wasn't that identical tree marked for corner of the Sharpless survey in 1824?

A. No, sir; that corner is standing on the ground probably a perch to the northeast; this tree was marked as a witness to that corner.

Q. You say it was marked nowhere either for the north, south, east, or west; nowhere for a corner?

A. I say it was marked for a corner. I don't know as a corner for that.

Q. You say it was not marked for a corner of a survey in 1824?

A. Yes, sir; I say it was marked as a witness, not corner, in 1824; it is a witness on the ground.

Q. What were the marks upon that?

A. Three notches.

Q. In how many places?

A. I don't think they were in but one place, on the north side of the tree.

Q. Indicating the corner for which it was a witness was north of that?

A. Yes, sir; a corner standing.

Q. What is the corner that is standing?

A. I want to refer to my notes. I have noted pitch pine marked on four sides for corner, old marks; took a block from the north side and one from the east side; counted 87 to 88; that was the count I made on the ground; afterwards I took these blocks and counted them probably twenty times; since then I took them
119 to a photographer and endeavored to have them photographed to see if I could bring out the growths, and tried in every way I knew to ascertain the exact age.

Q. You say from 87 to 88?

A. Yes, sir; from my notes on the ground, and since then from my frequent examinations, I say 86 to 88.

Q. Had it been blocked before?

A. Yes, sir; on the east side or west; I can't recollect.

Q. Wasn't it blocked more than once?

A. It might have been; it was not blocked on the south side.

Q. How long before you were there had it been blocked, do you suppose?

A. I don't know.

Q. It might have been done two years before or more?

A. I can't say that.

Q. Then this tree is 150 perches on the north line of the Branham; was marked there at the time or in the year the Branham was located, surveyed, or in the year the Richard Martin was located, surveyed?

A. Both the Branham and the Martin were located in 1794, one in the spring and the other in the fall; this tree may have been marked in 1793.

Q. It may have been marked in 1793?

A. Yes, sir.

Q. How do you account for the fact that a surveyor would mark a tree in 1793 on the south side of the Martin?

A. I account for it in this way: Whoever located the surveys south of the Le Fevre lands ran the line northward and marked a gum corner, which is on the northwest corner of the Johnston Beasley tract and the northeast corner of the Lewis Walker (not this batch, but Lewis Walker of the lower batch); then I believe, and have reason to believe it from maps in my possession, that they continued that line northward to the south line of the Francis West and then westward to the pine corner 150 rods west of the
120 "post by the pine" and then abandoned the survey.

Q. That, you think, was done in 1793?

A. It might have been done in 1793; that is my impression.

Q. It is your impression the surveyor, when he went there in 1793 to locate the Brush Valley block, during the same time ran the whole northern line of that block, connecting it with the West, covering the Martin on the north and down to post by pine corner, and then did this work you have mentioned from the gum to the pine?

A. No, sir; I don't think that; I think the party that located the lower block may have been another deputy from the one who located the Brush Valley block, and that he ran his line northward, connecting the Francis West. I believe the deputy that located the Brush Valley block ran his lines eastwardly from the Daniel Reese, but whether he ran further east than the Lobdell I cannot say. I can discover no evidence that he done so, and I have made a thorough examination.

Q. You found trees on the south of the Richard Martin which bore the same date as those on the northern line of the Brush Valley, did you not?

A. I cannot say, because I have not been able to count them accurately.

Q. You say you found two between the Branham and the Martin. Don't you know there were five or six?

A. There were not five or six trees there when I was there; 64 perches west of post by pine there stood a pine tree it was claimed counted back to date of survey of 1793. I have in my possession a block which counted either to 1793 or 1794. The chestnut oak and this pine corner was all the trees that I found; there may have been other trees other surveyors found who made prior surveys.

121 Q. Who were with you at the time you made your survey of the line between the Branham and the Martin?

A. William P. Mitchell, Wm. Cheatham, Robert McCully, and W. A. Edeburne, of Pittsburgh.

Q. Those were the only two trees that you found?

A. Those were the only two trees that I found; yes, sir.

Q. Have you any doubt in your mind that the south line of the Richard Martin was run upon the ground at least that distance?

A. I have not; at least I have no doubt there was a line run on the ground on the Richard Martin to extent of 150 rods.

Q. The official distance of the southern line of the Richard Martin is 308 perches?

A. Yes, sir.

Q. At 150 perches you have made a map by which you show the course run from that pine the official distance between the Lobdell and the Martin?

A. Yes, sir.

Q. What right would you — as a surveyor or owner of the Branham to cut off a piece of the Martin, which was fixed?

A. I would locate the Richard Martin—that is, I would locate the southern line of the Richard Martin—by monuments on the ground,

and I would then locate it where there were no monuments to answer the calls; I would disregard the official lines, courses, and distances and go to call for the Lobdell; the location of the southern line of the Martin is not material in this case; as far as the length of the southern line of the Martin goes, I would be obliged to follow the line; I would be first obliged to locate the Martin, and then I would locate the Branham.

Q. Then would you have to follow the official courses between the Branham and the Martin until you came to the Lobdell?

A. I would follow it so far as marked on the ground; if I satisfied myself, as I have done in this case, that the pine corner was the end of that survey, then I would disregard the courses and go to
122 call for this reason; I don't know of any instance where a younger survey can alter the lines of an older.

Q. Answer my question: Would you first locate the Richard Martin?

A. Yes, sir.

Q. And you would have to give it its official course of the line between the Martin and the Branham?

A. I would disregard the courses.

Q. Because that is a senior survey?

A. Yes, sir.

Q. Then when you came to locate the Branham tract, which I have asked you to locate, would you follow the courses returned by the deputy surveyor?

A. I would locate the Branham by its calls.

Q. Could you go north of the line and take any off of the Richard Martin, which is a senior survey located, until you came between the Lobdell and the Martin?

A. I would take no part of the Martin; my idea is that the Martin should be located in the way I have indicated—that is, if the pine corner is the end of the survey by the deputy, then I contend the course of the Martin from that must give way; it must go to its call.

Q. How long would be your western line of the Richard Martin as you would locate it?

A. It would be 320 rods, the official distance.

Q. 320 rods; now, you have 32 rods excess on the official?

A. Certainly.

Q. If you start the official course from the post by pine you have 32 or about 31 rods of an excess in the line; you would not by following the official course come out in exact line of the monuments on the ground; wouldn't you come out 32 rods further south on the line between the Lobdell and the Martin?

A. Yes, sir.

123 Q. Isn't that the proper way to locate the Richard Martin, by the monuments on the ground?

A. I think not.

Q. Then you, as a surveyor, say before this court and jury if you found monuments on the ground for 150 perches marked for the southern line of the Martin that you would be justified in changing

the course and running out the official distance between the Lobdell and the Martin?

A. Not exactly in that way. I can say if I came to a pine corner at 150 rods which satisfied me that was the end of the survey I would do it: there might be line trees on the ground for only 150 rods, and I would not be justified in a case of that kind in changing the course. In this case I am satisfied that the 150 perches is the end of the survey; consequently from there westward I would disregard the courses of the Richard Martin to go to its call. My idea is this: Where there are monuments in the ground they control the survey, but where there are no monuments locate by the call.

Q. If you found two monuments, as you have stated you found two monuments, for the Branham on its northern line wouldn't they establish the course of that northern line?

A. No, sir.

Q. They would not?

A. Not in my opinion; they would if they were simply line trees; then I would run the whole course. In this case the pine corner indicates that was the end of the survey; we made a thorough search in different directions to ascertain where the surveyor had run.

Q. You say, as a surveyor, if you had found two trees on the line of a survey in the exact course, giving the proper variations
124 as returned by the deputy surveyor in 1793, that you would only follow the line so far as you found marked trees, and then dodge off to the official calls?

A. No, sir; I said nothing of the kind.

Q. Isn't that what you would do in this case?

A. No, sir; on the contrary, if those two monuments you speak of were line trees, and there were no other, I would continue that line along its official course and distance, but if I was satisfied that the surveyor had run only to a certain corner and fixed a corner, then afterwards adopted that line for the line of another survey, then I would consider that was all the work he had done, and from that point the younger survey should answer the calls for the older survey.

Q. You have stated the southern line of the Richard Martin was located upon the ground by monuments?

A. A portion of it.

Q. Does not the location of a portion of a line establish the whole line?

A. I have given my opinion.

Q. If you found two monuments near the eastern corner post by pine you would not consider the two monuments would control the whole southern line?

A. If those two monuments were simply line trees.

Q. If you would find five or six in the exact course returned by the deputy surveyor?

A. That would depend upon the extent of the survey. In this case I satisfied myself that pine corner was the one adopted by the Martin. I would locate it in that way; it is a matter of law and not of survey.

Q. If on a common line, starting by post by pine corner at 39 perches, you found a tree and three or four more bearing marks of a survey west of the pine tree that you have spoken of, would you consider those trees would establish the whole of that line?

125 A. Yes, sir; I would run out the official course and distance and locate in that way.

Q. The only thing inducing you to dodge north 32 perches on that line between the Lobdell and the Martin bending the line where the deputy surveyor returned a straight line under oath would be the finding of the pitch pine?

A. The western line of the Richard Martin calls for 320 perches to a post, the same length as the east line of the Lobdell, and having satisfied myself, as I did in this case, that the pine corner was the end of that survey which had been adopted for the Martin I would disregard the course and go to the call.

Q. Then the only thing that induces you to leave your marked line fixed by monuments is because you can find no trees west of 150 perches?

A. No, sir; it is because the corner indicates that it is the end of the survey.

Q. In other words, you allow calls to official returns and distances to control the monuments instead of the monuments controlling them?

A. No, sir; I locate by the monuments, but where I have no monuments I allow the calls to control.

Q. How do you know that is the end of the survey?

A. Because I examined the line very carefully and found no marked trees beyond.

Q. How far east and west?

A. I examined it the whole length of the Martin & Lobdell, Bean, Young, Ruston, and all through.

Q. Do you testify before this jury that the marks you found on the common line between the Martin and Branham there is now left only two trees for monuments within the courses that William Gray returns; he ran that line that will bear date to the survey?

A. I testified that there were chestnut oak, hemlock, and pine trees west of this pine corner on the line that we run from the post by pine to the southeast corner of the Lobdell 32 perches below.

126 Q. That would have borne date?

A. Yes, sir.

Q. How many?

A. I could not tell.

Q. Were there two or more?

A. Yes, sir.

Q. Plenty of them?

A. I don't say plenty, but sufficient to indicate the line westward; some trees fully three feet in diameter.

Q. In line on the official course?

A. Yes, sir.

Q. On the south of the Lobdell?

A. Yes, sir; that is, we took what we thought was the official

course; recollect it is a mighty difficult thing to tell exactly; the course varies from two and a half to four degrees or more by running line from post by pine corner as we found it; that corner is pretty hard to locate within a perch; there was plenty of timber—that is, in 1881 when we were there.

Q. Then, as a surveyor, I understand you to say that you don't consider the monuments on the south side of the Richard Martin as controlling the whole length of the line—the south line of the Richard Martin?

A. I do not, for the reason that at the end of 150 perches I found the pine corner and no monuments west of it. I desire to say here I have heard the testimony of the other surveyors and they have testified that there were no marked lines.

Q. I am asking you merely on this one line; you found monuments fixing the official course from post by pine westward fixing the southern line of the Richard Martin, but you don't con-
127 sider that they control that line further than the monuments then on the line?

A. I must answer your question in two ways: If simply monuments for the lines I would run the lines.

Q. I am asking you whether the monuments you found control the southern line of the Richard Martin further than the last tree you found?

A. They control as far as those monuments extend, but no further.

Q. Then where do you go?

A. Then I go to the call—the southeast corner of the Lobdell.

Q. What course, then, to run the whole southern line of the Martin?

A. South 89¾ east.

Q. How would you run from the last tree?

A. I have not calculated the course. I would say it would not make a lot of difference.

Q. I want to know what you run at?

A. I did not run it at all, just projected it. I can calculate that line for you.

Q. Is that line that you have laid down there chamber work, plotted, or actually run upon the ground?

A. I don't know whether you would regard it in that way or not; it would constitute two lines of a triangle which I have run, and the other line would be the hypothenuse.

Q. The line from this point, from 150 perches about midway of the Richard Martin going down the official distance, did you run that line?

A. Not on that line; but I run on the official course.

Q. You did not run that?

A. No, sir.

Q. Then that is plotted out there?

A. Yes, sir.

Q. What course did you plot it?

A. Maybe a difference of about 10 degrees, making that
128 course about south $75\frac{5}{10}$ east.

Q. So that the jury may understand this, the dotted line, the one that is farthest south, was not run by you at all?

A. No, sir.

Q. You started by post by a pine and you run that line just as the deputy surveyor did, the course and distances in a westerly direction for 150 perches. Is that correct?

A. Yes, sir.

Q. In that distance you found two monuments to the date of that survey?

A. I don't say that. I say that I am not able to count them back to date of any survey.

Q. It was to either one or the other of those surveys?

A. No, sir.

Q. Didn't you say that those were made there for one or the other surveys?

A. I stated it counted back to 1793 or 1795.

Q. You won't even admit, although this counts within a year before or after, that it applies to one of the surveys?

A. I explained to you what I thought.

Q. Were they put there in 1793 or 1794?

A. I believe they were marked in 1793.

Q. Were they put there by accident or for some purpose?

A. Put there for some purpose.

Q. Was the purpose for a line between the Branham and the Richard Martin?

A. I think for an entirely different purpose.

Q. For what purpose?

A. For the purpose of locating another batch of surveys.

Q. Where?

A. That is, to continue the block of surveys back further east. I think it was done for the purpose of another survey, which was abandoned.

129 TUESDAY, *November* 22
(Latter portion of afternoon session).

Q. How long is that offset between the Thomas Ruston and the Mary Ruston, Jr.?

A. That is, on the Clement line?

Q. I am asking you altogether about the running of the Clement line.

A. Well, I found the offset between the southwest corner of the Mary Ruston and the southeast corner of the Thomas Ruston, as located by Mr. Clement's surveys, 69.4 rods.

Q. Then when you run along south of the Thomas Ruston or the Clement line and came to the next offset that also runs up south into a little cove in the mountains?

A. I don't think there is much of a cove.

Q. Do you recollect the Tarplot?

A. There is a small stream to the east which would form a ravine, of course.

Q. Do you recollect finding the Indian path?

A. Yes, sir; crossing the Indian path, headed towards the north.

Q. You have marked it on your surveys as you found it on the ground; I suppose the track has passed from one side of the mountain to the other and you put it down guessed at?

A. Yes, sir; we noted it as it crossed and projected it on over.

Q. And you put down the point where it crossed the Thomas Ruston in its proper position?

A. Yes, sir.

Q. Do you know anything about the Indian path?

A. Yes, sir; I know something about it—what I heard in other places; it was a prominent feature in the Hutton & Green.

Q. When you get to the southeast corner of the Mary Ruston you are then on the top of the mountain, are you not?

A. Yes, sir; we are on the top of the mountain.

Q. Then you have a straight line from there on until you
130 come to the Mary Myers?

A. Yes, sir.

Q. When you came to the line between the Thomas Billington and John Reynolds how far were you from the swamp?

A. Just north of it.

Q. About how many rods?

A. It might have been 5 or 6; I didn't notice particularly; the stream there indicates a swamp.

Q. The stream that you have sketched on this map, that is from that swamp?

A. Yes, sir; those streams generally rise in swamps.

Q. Did you examine the swamp?

A. It is a pretty large swamp—covers several acres; it's considerable of a swamp; I made no examination of it, except on this line.

Q. There is more timber, is there not, in the swamp?

A. A good deal of timber; yes, sir.

Q. Did you find any marks of 1814 along there?

A. I did not; I don't know whether I did.

Q. See whether you did.

(Witness examines note book.)

A. No, sir; I did not.

Q. Did you find any old marks on that line?

A. I found one tree that counted 10 years; I found a chestnut oak that had been blocked on the northwest side—not an axe mark—and 203.6 I found a post and stone corner that was new that would be on a direct line of the Billington & Reynolds, continued southward 66 perches.

Q. That is, it would be on a direct line between the Billington and Reynolds 66 perches south of Rockefeller's maple sprouts?

131 A. Yes, sir.

Q. On this line what marks of surveyors did you find, and to what date did the marks count, so far as you have gone? Now, you

have gone all the way to Mary Myers' line, what evidence did you find of those lines having been run by other surveyors—what marks?

A. I found there had been a number of new surveys in there on locations slightly differing, within a few perches one way or the other, made within the last 10 or 12 years; there were one or two trees we found bearing older marks; whether they were marked as line trees or not we couldn't tell exactly. I see we have a pitch pine line tree counting 46 to 47 years.

Q. Where was that?

A. That was on the offset, probably a witness; it was east of west line; it was 8.5 perches north of Clement's line.

Q. That would indicate that about 46 or 47 years before you were there some other surveyor had been there about the time you were born?

A. Indicated that somebody had been there and marked the tree.

Q. Was it marked as a line tree or as a corner?

A. It was not marked in the direction of the line but in an opposite direction—an east and west line.

132 The counsel for the plaintiff, to further maintain the issue on the part of the plaintiff, read the testimony of David Rockefeller, a deceased surveyor, taken on a former trial, who testified, *inter alia*, as follows:

I began on the northern line of the Thomas Ballington tract of the asylum company's land on the summit of Little Mountain, about three miles east of the Bear Gap; I traced this line north 88 degrees, west about 69 perches, to a black oak corner, in the offset, I think, of the Billington line; thence south 20 degrees, west 11½ perches, to a small black oak corner; thence north 88 degrees, west 21 perches, to a fallen black oak, old corner, at the northweste orner of the Thomas Billington; thence south 20 degrees, west 16 perches, to the old northeast corner of John Reynolds; corner down, but old witnesses; continued same bearing; at 138 I cut into a pine and counted 53 years and corresponded with the date of the asylum company's surveys; at 168 perches I cut into a white pine sight tree, counting 53 years; at 172 perches I crossed the south branch of Big Roaring creek; at 196 perches I crossed the Brush Valley road—an old timber road—leading up the valley from the creek to the foot of Big Mountain; I run through nothing but barren brushes for 128 perches; at 300 perches commenced raising over the mountain; stopped at 332 and cut into hemlock sight
133 tree counting 53 years; at 340 perches, allowing for the hills, etc., a maple stump, with sprouts growing around it. The tree had apparently been about six or eight inches in diameter. It had been burned and the stump was about a foot high. The tree was lying down as it fell, right down the mountain, and the trunk of the tree was burned entirely away for perhaps six or seven feet, with the exception of two narrow scales about an inch thick that were burned on the inside; that is the description of the tree, as near as I can recollect. Then I have said in my notes old corner maple stump. There is a chestnut oak witness to the corner, about

eight feet west of the maple stump. This is the only living corner called for in the southern boundary of the asylum company's lands and the northern boundary of the Lafavre lands, and serves as a guide to this boundary for a long distance, both east and west. I cut a block cut of the witness; the tree was hollow; it had decayed from the heart, but didn't interfere to effect the mark below the bottom of the mark. There was sound wood about half, or half an inch in, that was below the mark, so that the decayed tree would not effect the mark any; that block counted 53 years. In the evening I took that block down to the Bear Gap tavern and showed it to Mr.
134 Bellas. He counted it and counted 53 years. After he counted that block he took out his pocket-book and handed me a $500 dollar bill. I asked him what that was for, and he said he would make me a present for your accurate skill as a surveyor. The reason I mention this is because it has been intimated to me that I had been bribed in locating the Shannon.

Cross-examination:

Q. You have been county surveyor here, haven't you?
A. Yes, sir.
Q. Had control of the county papers for many years, hadn't you?
A. 16 or 18 years.
Q. Do you know from anything of that kind who were the deputies of Gray? If so, tell us.
A. I think at that time Gray had five regular deputies. He had Harry Donnel, John Reese, Thomas Hamilton, William Brady; I don't recollect the other one.
Q. Henry Donnel was the father of Judge Donnel?
A. Yes, sir.
Q. When did he die?
A. I think he did in the month of June, 1825.
Q. Do you know what part of Gray's district Donnel had?
A. I think pretty much all on this side of the river in the Shamokin coal region.
135 Q. You know from the official papers his district was on this side of the river, embracing Shamokin McConnel coal regions where these surveys are, do you not?
A. Yes, sir; Gray had three very good deputies, Donnel, Reese, and Hamilton, but Brady and the others run helter-skelter; very wild.
Q. I didn't get exactly the dates when you went upon these lands with Judge Shipman and other gentlemen.
A. I think it was on the 29th of August, 1871.

136 The counsel for the said defendant, to maintain the issue on the part of the defendant, produced and offered evidence showing that he was the owner of two certain tracts of land surveyed on the 2nd day of October, 1793, in pursuance of two warrants dated June 11th, 1793, one granted to Charlotte Ruston and the other to Mary Myers, and offered evidence tending to show that the land in dispute was embraced within these surveys; and to further maintain

the said issue on the part of the defendant offered, *inter alia*, the following official papers:

January 3rd, 1793.—Warrant to Jno. Houston for 400 acres of land, including the head spring of north branch of Roaring creek, adjoining land of Captain Thomas Mason.

January 3rd, 1793.—Warrants to Francis West for 400 acres of land adjoining land this day granted to John Houston.

10th of September, 1793.—Survey for John Houston, 420.5 acres and allowance, in pursuance of warrant of the 3rd of January, 1793; calls for Steadman & Co. on the north, on the east for George Dewas, south vacant, west Francis West; for its southwest corner a chestnut oak; on its southeast corner a small black oak.

10th of September, 1793.—Survey for Francis West, in pursuance of warrant 3rd of January, 1793, 420.5 acres and allowances; calls for Steadman & Co. on the north, on the east for John Houston, south vacant, west Steadman & Co.; for its southwest corner a post by a pine, and for its southeast corner a chestnut oak; at its north-
137 east corner a black oak, and at its northwest corner a small maple.

Copy of old purchase voucher 10.694 for the John Houston and Francis West surveys:

Old purchase blotter.

10694.

1793, Mar. 14th.—D. Rees, ets., 16 wts. of 400 ea., 6400 as., a 50 f. pct., £160.

Cr. By De Rees for amt., pl. and int., on the 2 following unsatisfied wts.

Wt., dat. 2 Nov., '84.—Geo. Fleming, 300 as., do. 31 Dec., '84, to Wm. Flanogan, 400.

Amt.	£103.18
Cash in spec., pt. cash	56.02
	£160.

Fees, £8; pd rem'r of check of Walter Stuarts, Esq., rects. deliv'd W. S.

Blotter certified to 14th day of June, 1876.

Counsel for defendant offer the following applications:

Application No. 21. John Young, merchant, applies for 400 acres of land in Northumberland county, in Catawissa township, including the old path running from Yarnalls to Catawissa, including the waters of the east branch of Roaring creek.

Application No. 22. Joshua Bean applies for 400 acres of
138 land in Northumberland county adjoining lands this day granted to John Young, merchant.

Do. No. 23. Daniel Reese applies for 400 acres of land in Catawissa township, Northumberland county, near the head of the east branch of Little Roaring creek, about three miles below Catawissa Path.

Do. Charlotte Ruston applies for 400 acres of land adjoining the warrant granted this day to Daniel Reese in Catawissa township, Northumberland county.

Do. Mary Myers applies for 400 acres of land adjoining a warrant granted this day to Charlotte Ruston in Catawissa township, Northumberland county.

Do. John Reynolds applies for 400 acres of land adjoining a warrant this day granted to Mary Myers in Catawissa township, Northumberland county.

Do. Thomas Billington applies for 400 acres of land adjoining warrant this day granted to John Reynolds in Catawissa township, Northumberland county.

139 Do. Mary Ruston applies for 400 acres of land adjoining a warrant this day granted to Thomas Billington in Catawissa township, Northumberland county.

Do. Thomas Ruston applies for 400 acres of land adjoining land this day granted to Mary Ruston in Catawissa township, Northumberland county.

Do. Mary Ruston, Jr., applies for 400 acres of land adjoining a warrant this day granted to Thomas Ruston in Catawissa township, Northumberland county.

Do. Samuel Lobdell for 400 acres of land adjoining warrant this day granted to Joshua Bean.

Old purchase voucher No. 11612 for the John Young, Joshua Bean, Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., and Samuel Lobdell

Counsel for defendant offers old purchase blotter.

11612.

1792, 2 Oct.—Dr. Ruston, 40 wts. 15900 as., 10 per ct.; p'd sp. check for £397 10 sh; fees, £20, p'd; rem'r check, $1,113.33; one rect't d'd to Dr. R.

140 June 11th, 1793.—Warrant to Daniel Reese — 400 acres of land near the head of the east branch of Little Roaring creek, about three miles below Catawissa Path, in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Charlotte Ruston for 400 acres of land adjoining land this day granted to Daniel Reese in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Mary Myers for 400 acres of land adjoining land this day granted to Charlotte Ruston in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to John Reynolds for 400 acres of land adjoining land this day granted to Mary Myers in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Thomas Billington for 400 acres of land adjoining land this day granted to John Reynolds in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Mary Ruston for 400 acres of land adjoining land this day granted to Thomas Billington in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Thomas Ruston for 400 acres of land adjoining land this day granted to Mary Ruston in Catawissa township, Northumberland county.

141 June 11th, 1793.—Warrant to Mary Ruston, Jr., for 400 acres of land adjoining land this day granted to Thomas Ruston in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to John Young, merchant, for 400 acres of land, including the old path running from Yarnall's to Catawissa and including the head waters of the east branch of Roaring creek, in Catawissa township, Northumberland county.

June 11th, 1793.—Warrant to Joshua Bean for 400 acres of land adjoining land this day granted to John Young, merchant, in Catawissa township, Northumberland county.

Second of Oct., 1793.—Survey to Daniel Reese, 386¼ acres and allowance, in pursuance of warrant dated 11th day of June, 1793.

2d of October, 1793.—Survey for Charlotte Ruston, 426 acres 122 perches and allowance, in pursuance of warrant dated 11th day of June, 1793, calling for vacant on the north, Mary Myers on the east, vacant on the south, Daniel Reese on the west.

2d October, 1793.—Survey to Mary Myers, 443¼ acres and allowance; no call on the north; east, John Reynolds; south, vacant; west, Charlotte Ruston.

2d October, 1793.—Survey to John Reynolds, 443¼ acres and allowance, in pursuance of warrant dated the 11th day of June, 1793, calling for vacant north, Thomas Billington east, south vacant, Mary Myers west.

142 (—) October, 1793.—Survey to Thomas Billington for 411 acres and allowance by virtue of warrant dated the 11th day of June, 1793, calling for vacant on the north, Mary Ruston on the east, vacant south, John Reynolds on the west.

2d October, 1793.—Survey to Mary Ruston for 434.5 acres and allowance in pursuance of warrant dated 11th day of June, 1793, calling for vacant north, Thomas Ruston east, vacant south, Thomas Billington west.

3d October, 1793.—Survey for Mary Ruston, Jr., for 380¼ acres and allowance by virtue of warrant dated 11th day of June, 1793, calling for vacant north, John Young east, vacant south, and Thomas Ruston west.

3d October, 1793.—Survey for Thomas Ruston for 418.5 acres and allowance in pursuance of warrant dated the 11th day of June, 1793, calling for vacant north, Mary Ruston, Jr., east, vacant south, and Mary Ruston west.

3d October, 1793.—Survey for John Young for 400¼ acres and allowance in pursuance of warrant dated the 11th day of June, 1793, calling for vacant north, Mary Ruston, Jr., east, vacant south, and Mary Ruston west.

3d October, 1793.—Survey for Joshua Bean for 429 acres 129 perches and allowance in pursuance of warrant dated the 11th day

of June, 1793, calling for vacant on the north, Samuel Lobdell east, south vacant, and John Young on the west.

143 3d October, 1793.—Survey to Samuel Lobdell for 410 acres and allowance in pursuance of warrant dated the 11th day of June, 1793, calling for vacant on the north, vacant east, vacant south, and Joshua Bean west.

All returned by William Gray, deputy surveyor.

Also offer certified list of returns of William Gray, deputy surveyor, certified 9th day of June, 1876, by Wm. McCandless, secretary of internal affairs. Entered in deputy surveyor's list of returns of surveys, county of Northumberland, is found the following as made by William Gray, D. S.:

1794, Feb.	28.	Richard Martin,	419¾ A.
" Mar.	3.	Samuel Lobdell,	411 "
"	"	Joshua Bean,	429¾ "
"	"	John Young,	409¼ "
"	"	Mary Ruston, Jr.,	380¼ "
"	"	Thomas Ruston,	418½ "
"	"	Mary Ruston,	434½ "
"	"	Thomas Billington,	411 "
"	"	John Reynolds,	444¼ "
"	"	Mary Myers,	443¼ "
"	"	Charlotte Ruston,	426¾ "
"	"	Daniel Reese,	386¼ "

17th October, 1794.—Patent to John Nicholson for a tract of land surveyed on warrant dated 11th day of June, 1793, granted to Daniel Reese, who, by deed dated June 14th, 1793, conveyed the same to Thomas Ruston, who, by deed endorsed July 25th, 1794, conveyed same to John Nicholson, with the appurte-

144 nances.

Entered in Patent Book P No. 24, page 40.

24th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of warrant dated the 11th day of June, 1793, granted to Charlotte Ruston, who, by deed dated the 12th day of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed — July 25th, 1794, conveyed the same to said John Nicholson, with the appurtenances.

Entered in Patent Book P No. 24, page 47.

18th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of a warrant dated the 11th day of June, 1793, granted to Mary Myers, who, by deed dated the 12th day of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed the 25th day of July, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P, vol. 22, page 320.

18th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of a warrant dated the 11th day of June, 1793, granted to John Reynolds, who, by deed dated the 12th of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed the 25th day of July, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P No. 23, page 50.

18th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of a warrant dated the 11th day of June, 1793, granted to Thomas Billington, who, by deed dated the 12th day of June, 1793, conveyed the same to Dr. Thomas Ruston,
145 who, by deed endorsed the 25th day of July, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P, vol. 22, page 318.

17th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of a warrant dated the 11th day of June, 1793, granted to Mary Ruston, who, by deed dated the 11th day of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed July 25th, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P No. 22, page 318.

24th October, 1794.—Patent to Robert Morris for a tract of land surveyed in pursuance of a warrant granted to Dr. Thomas Ruston, who, by deed dated the 22d of July, 1794, conveyed the same to Robert Morris, with the appurtenances.

Entered in Patent Book P No. 24, page 54.

18th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of the warrant dated the 11th day of June, 1793, granted to Mary Ruston, who, by deed dated the 12th day of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed the 25th day of July, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book No. 34, page 43.

18th October, 1794.—Patent to John Nicholson for a tract of land surveyed in pursuance of warrant dated the 11th day of June, 1793, granted to the said John Young, who, by deed dated the 12th
146 day of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed the 25th day of July, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P, vol. 24, page 93.

25th October, 1794.—Patent to John Nicholson for a tract of land surveyed on warrant dated the 11th day of June, 1793, granted to Samuel Lobdell, who, by deed dated the 12th of June, 1793, conveyed the same to Dr. Thomas Ruston, who, by deed endorsed July 25th, 1794, conveyed the same to the said John Nicholson, with the appurtenances.

Entered in Patent Book P, vol. 24, page 48.

Jan'y 22d, 1794.—Richard Martin applies for 400 acres on the south branch of Roaring creek adjoining land surveyed for Wm. West in the county of Northumberland.

Old purchase voucher 11941, certified to by Wm. McCandless, secretary of internal affairs, 14th day of June, 1846. Among the tracts embraced in this voucher is the Richard Martin, 400 acres of land of the south branch of Roaring creek adjoining land surveyed for William West in said county.

22d January, 1794.—Warrant to Richard Martin for 400 acres of land on the south branch of Roaring creek adjoining land surveyed for William West.

147 23d February, 1794.—Survey for Richard Martin by virtue of warrant dated the 22d of January, 1794, 419¼ acres and allowances, calling for north for Francis West, east, south vacant, and west Samuel Lobdell; for its northwest corner a pine and its southeast corner a chestnut oak, calling for a small black oak for its east line and at its southern corner for a post by a pine, southwest corner a post. The return of this survey, made by Wm. Gray, taken from his list of returns.

Offer a certified copy, certified to by William McCandless June 9th, 1876.

Among the deputy surveyor's list of returns of surveys in the county of Northumberland is found the following as made by William Gray, D. S.:

Application. William Elliott applies for 400 acres of land on a branch of Roaring creek adjoining Dr. Thomas Ruston's other lands in Catawissa township, Northumberland county.

Application. Lewis Walker applies for 400 acres of land lying one mile north of the road leading from Reading to Sunbury adjoining Dr. Thomas Ruston's other lands in Catawissa township, Northumberland county.

Do. William Shannon applies for 400 acres of land lying one mile north of the road leading from Reading to Sunbury adjoining Dr. Thomas Ruston's other lands in Catawissa township, Northumberland county.

148 Do. Nathaniel Brown applies for 400 acres of land on a branch of Roaring creek adjoining Dr. Thomas Ruston's other lands in Catawissa township, Northumberland county.

Do. Ebenezer Branham applies for 400 acres of land on a branch of Roaring creek adjoining Dr. Thomas Ruston's other lands in Catawissa township, Northumberland county.

(These applications are on the paper containing the applications of 63 persons.)

Old purchase voucher 12969 for tracts of land in warrantee names of Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Ebenezer Branham, and Nathaniel Brown, certified the 9th day of February, 1856, by J. Porter Brawley, surveyor general.

Old purchase blotter.

12969.

1794, June 14th.—Dr. Thomas Ruston, 6 wts. of 400 ea., am't 2400, a 50 spct. paid, spec. ch. £60 rec't d'd fees 6 p. p'd, renir. ch. of 168 Ds. certified to J. Porter Brawley, surveyor general, 9th day of February, 1856.

26th February, 1793.—Warrant to Joseph Tyson for 400 acres of land lying one mile north of the road leading from Reading to Sunbury adjoining Dr. Thomas Ruston's other lands.

149 26th February, 1793.—Warrant to William Elliott for 400 acres of land adjoining land this day granted to Cadwallader Evans.

Do. Warrant to Lewis Walker for 400 acres of land lying one mile north of the road leading from Reading to Sunbury adjoining other lands of Dr. Thomas Ruston.

Do. Warrant to William Shannon for 400 acres of land lying one mile north of the road leading from Reading to Sunbury adjoining other lands of Dr. Thomas Ruston.

Do. Warrant to Nathaniel Brown for 400 acres of land lying on a branch of Roaring creek adjoining land of Dr. Thomas Ruston.

Do. Warrant to Ebenezer Branham for 400 acres of land lying on a branch of Roaring creek adjoining land of Dr. Thomas Ruston.

22d October, 1794.—Survey by virtue of warrant dated the 26th of November, 1793, to Joseph Tyson, 453 acres and allowance, calling on its northwest for vacant, on its southwest for the Thomas Reese, Jr., for an ash at the west, chestnut oak on the north, a chestnut on the south, and calling for Daniel Reese, property of Dr. Ruston, and William Elliott on the east.

150 Do. Survey by virtue of warrant dated the 26th of November, 1793, to William Elliott, 368 acres and allowance, calling for Daniel Reese, Charlotte Ruston, Mary Myers, and part of the John Reynolds on the north, on the east for Lewis Walker, on the south for Dr. Thomas Ruston, in the right of Jesse Brooks, Jesse Evans, Sarah Lane, and on the west for Joseph Tyson.

Do. Survey by virtue of warrant dated the 26th of November, 1793, to Lewis Walker, 371¼ acres and allowance, calling for John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston on the north, on the east for Nathaniel Brown, on the south for Robert Jordon, Peter Smith, Dr. Thomas Ruston, in the right of William Shannon, Jesse Brooks, on the west for William Elliott.

Do. Survey by virtue of warrant dated the 26th of November, 1793, for William Shannon, 415 acres and allowance, calling for Lewis Walker and Peter Smith, on the south for Dr. Thomas Ruston, in the right of William Gilbert, on the west for Jesse Brooks.

21st October, 1794.—Survey by virtue of warrant dated the 26th day of November, 1793, for Nathaniel Brown, 400 acres and allowance; calls for Mary Ruston and John Young on the north, on the east for Ebenezer Branham, on the south for Andrew Porter, for Dr. Thomas Ruston, in right of Robert Jordon, on the west for Lewis Walker and Thomas Ruston.

151 26th October, 1794.—Survey by virtue of warrant dated the 26th day of November, 1793, to Ebenezer Branham, 411¼ acres and allowance; calls for Joshua Bean, Samuel Lobdell, Daniel Reese, John Houston on the north, Steadman & Co. on the east, on the south Thomas Ruston, in the right of Lewis Walker and Andrew ——, and on the west no call.

Offer in evidence connected official draft of 55 tracts of land situate in Northumberland and Montour and Columbia counties, originally Northumberland county; warrants and surveys respectively

certified on the 22nd day of Nov., 1881, by Aaron K. Dunkle, secretary of internal affairs.

Also offer certified separate official draft of the Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, Samuel Lobdell, Richard Martin, and Francis West on one piece of paper, certified to by J. Simpson Africa, secretary of internal affairs, on the 8th day of September, 1873.

Also certified connected draft of the Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, Samuel Lobdell, and Richard Martin; certified on the 21st day of December, 1869, by Richard A. McCoy, for D. M. Cambell, surveyor general.

152 Also offer in evidence certified connected official draft of the William Elliott, Lewis Walker, Nathaniel Brown, and Ebenezer Branham surveys; certified on the 13th day of June, 1876, by William McCandless, secretary of internal affairs.

Also offered in evidence a large draft made by H. S. Boyer, and certified to by him, to show the location of the Brush Valley block and the Le Favre block and adjoining surveys.

153 And the counsel for the defendant, to further ma-ntain the issue on the part of the defendant, produced M. B. TRESCOTT, a witness, who, being duly sworn, among other things, testified as follows:

Q. Where did you commence surveying when there and what did you do?

A. I began at the northeast corner of the Lewis Walker.

Q. Just state where you commenced, what you did, and how you found those surveys.

A. I began at the northeast corner of the Lewis Walker, and the southeast corner of the Ebenezer Brantam, the northeast corner of the Johnson Beasly. From there I run the official course and distance with the excess. I was not using the compass. I only made a note of the official courses and sometimes the variations that the surveyor run.

Q. You run that line?

A. Yes, sir.

Q. What did you do after that?

A. At 56 perches, the official distance being 52—at 56 perches we came to a stone heap; the official papers call for a chestnut.

154 From that we run the southern line of the Francis West eastward far enough to find two or three original line trees on that line. From that I returned to the stone heap and run the same course westward about 110 rods to the post by the pine.

Q. What point is that?

A. That is the southwest corner of the Francis West and the southeast corner of the Richard Martin and the corner on the northern line of the Ebenezer Brantam.

Q. Is there any difficulty in establishing that corner, if there is any possibility of missing that corner?

A. By running the official courses of the Ebenezer Brantam from the chestnut, or now stone heap, it brings us to that point, and by running from that point out six rods I found the original line tree bearing date to the original survey.

Q. Then there being a monument on the southern line of the Francis West and a monument on the eastern line or western line of the Martin, can any surveyor mistake where that corner should be accurately?

A. I should think he could not be mistaken where that corner is.

Q. Now go on.

A. We run the western line of the Francis West, its official distance, with an excess of about 32 rods, by our chainmen. We found there the remains of an old tree burnt out, with a stone heap or pile in the stump.

155 Q. What point is that?

A. The northwest corner of the Francis West, a corner on the eastern line of the Richard Martin. From that we run the eastern line of the Richard Martin up to its northeasterly corner. About two rods short of its official distance we found a stone heap, a post, and stones and an old chestnut oak witness previously blocked and cut to pieces. From that we run the northern line. I think it was north 87 degrees west, its official course. We found that line a little short until we came to a pine stump or stone heap. There is one old mark now living standing on that line; nothing that I thought was original. From that we run the line across between the Richard Martin and the Samuel Lobdell, 320 perches. I found one corner and quit there for the night. When coming back there I made a good search for any corner of any line running either east or west and found none. I then went back to the post by the pine and continued that line in its official course about 318 perches—stone corner, and then went back to the official distance of the Martin and the Lobdell in the line between them and chained,

156 and at about 34 perches, to a stump and stone heap. From that we run the southern line of the Samuel Lobdell north 87 degrees west.

By Mr. RYON:

Q. From what point?

A. From the stone heap at the intersection of the south line; the west line of the Richard Martin and the Samuel Lobdell. From that we run the south line of the Samuel Lobdell north 87 degrees west. I think — is the official course at 38 rods. We found an old fallen rock oak; it had been boxed as a line tree. I don't think any block had ever been taken out. It had been cut into.

By Mr. WOLVERTON:

Q. What is the difference between boxing and blocking?

A. Well, surveyors generally understand in boxing a tree they simply cut into it without taking a block out; blocking it is generally understood taking out the piece of the wood carrying the axe

mark; that tree had been cut and some years after it had been boxed; it was now down and considerably decayed. At some point along that line, I made no note of the distance, but within a short distance of the south corner, there was a large white piece. It had been boxed at one time. I think the oldest mark in it was about
157 55 years old; that was green and standing. I think it was slightly off the line.

Q. What year would that take you back to?

A. That was standing there boxed in 1827, and about 140 rods was an old rock oak boxed on both sides and broken down—at about a rod or two of excess. We found a stone corner, very little timber around it, containing the course on the Joshua Bean. I found one old oak log. The tree had been cut down for lumbering purposes. The body being hollow, it was cut off and lay there. That had an old mark. Of course the tree was dead and somewhat decayed, and could not get any date.

Q. Had it not the appearance of being an old line tree?

A. It had the appearance of being there a good many years, at about the official distance along the side of the hill. We found a stone heap from the southwest corner of the John Young and southwest of Joshua Bean.

Q. Describe that point.

A. That is near the foot of the northern side of a big ledge of rocks.

Q. Is there not at that point any tree that could be marked?

A. I think there was none when we reached there that would
158 have been likely to have been marked for a *a* corner. There is very few trees along that line.

Q. The monument made for the corner of that tract by the owner of the Bean, as you understood it, is on top of a big boulder?

A. Yes, sir.

Q. Describe the line from there on.

A. From there we run west, across the Joshua Bean, along a very steep hill, and near the foot of that ledge.

Q. Alongside the Joshua Bean—you mean the John Young?

A. The John Young. At about 170 rods was a corner, a black oak, I think it was, counting to the date of about 55 or 54 years—52 or 53 years.

By Judge LYNN:

Q. You mean from the southeast corner of the Young?

A. Yes, sir; at about the official distance we found a post and stone corner. The witness was very old. It was over stoney and rocky ground.

By Mr. WOLVERTON:

Q. Just describe the location of that line along the foot of that ledge, on the south of the Mary Ruston, Jr., and the John Young; describe it—the line that you ran from the post by the pine—where it was located with reference to the ledge of rocks.

159 A. At the southwest corner of the Joshua Bean we come up close to the foot of a ledge of rocks—a large ledge of rocks—extending along south of the John Young and along the Mary Ruston. There were large ledges of rocks, some places broken. It was very difficult to get up and down.

Q. Did you run at the foot of that hill?

A. We run down the side of the hill below the main part of the ledge.

Q. At what point are you?

A. The southwest corner of the John Young. From there we continued the same course to the southwest corner of the Mary Ruston, Jr. It brings us out near what is called the second cove in the mountain—a notch or break in the mountain. From that we run south 69 perches to a stone heap. The difference in the length of the official distance west of the Mary Ruston and east of the Thomas Ruston would be 69 rods.

Q. Just describe that cove where a surveyor went up or you went up.

A. Well, that run up a break or gradual rise in the mountain, not steep, nor are there any rocks of any account in it. The outcrop or ledge was partly left back a little west.

160 Q. Is that point the first place a surveyor could get up the mountain?

A. Well, it would be a convenient place for a surveyor to get up. Surveyors sometimes have to climb worse places. That would be a very convenient place to get up the mountain, and it would be the first place that would be open after leaving the corner of the Joshua Bean. It would be very difficult going up over those rocks and ledges. From that we run west, and at 174 perches I think we crossed a path.

Q. What path?

A. I don't know whether it is named on the official maps or not.

Q. What was it called or known as?

A. Well, it has been called the Indian path or the bear path. At 174 — we crossed the path, and at about the official distance we came to a stone corner. From that I run south 37 rods to a stone corner. At that point I turned west, and at about six rods—six or seven rods—I found a pine line tree marked north and south—counting 68 or 69 years. I ran out on that line, 80 rods on that line, and stopped for the night. The next morning I went back to that line

161 tree, and at 2.2 rods south of it was another well-marked north and south line tree, counting 68 years.

By Mr. RYON:

Q. What kind of a tree was that?

A. It was a yellow pine marked with a blaze and two notches on both sides. I continued from there south and found no corner, and searching west I found two or three trees bearing the same date, marked east and west—that is, on the south line of the Mary Ruston.

By Mr. WOLVERTON:

Q. Counting 68 years?
A. Counting 68 years.
Q. That would bring you back to 1814 or 1815?
A. 1814 or '15.

By Mr. RYON:

Q. Did you give the distance when you found those trees?
A. The distance it was between 10 or 12 rods from the intersection of the line that extended up toward the hill?

By Mr. WOLVERTON:

Q. On the line going west from the Mary Ruston?
A. Yes, sir.
Q. In that neighborhood did you find five or six trees bearing date of 1814 or 1815?

A. I think we found five; then we went back to the point
162 where we had quit the night before, about 80 rods from the southeast corner of the Mary Ruston. We continued that line and found some marks counting to 1847; at a point somewhat short of the official distance I came to a stone corner.

By Mr. RYON:

Q. Where is that?
A. On the south line of the Mary Ruston.

By Mr. WOLVERTON:

Q. Start on your official distance, going westward?
A. Yes, sir; it was short of it, I may say from information. I understood the north line was short of its official distance on the ground; that those corners were made to agree with the monuments on the northern line of the same tract from that. We continued west the same course and found some marks lower than the 1847, about the official distance—a small overplus—and found a stone corner at the north side of a swamp.
Q. At the north side of the swamp, at the intersection of the line between the Billington and the Reynolds?
A. Yes, sir; at the intersection of the line between the Billington and the Reynold, on the southern line we were following.

Q. Describe that.
163 A. It was built—an ordinary one—post and stones.
Q. Describe what you found at that corner.

A. Well, I didn't find anything there at that time; we went north at that time, from there across the valley to the north line, and we found these corners in place there with original witnesses; we then came back to the swamp and extended our line westward, and a little south of it was a gum tree bearing an old date.
Q. A little south of the swamp?
A. Westward of the swamp; a little south of our line from the

stone heap; I examined it slightly at that time and went on and continued the line by the official courses and distances across the turnpike; I crossed that stream on the south line of the John Reynold at about the official distance with a small excess; we came to a stone corner on the line of the Mary Myers; from that we ran south 60 rods to a stone heap; there was no timber scarcely after crossing that brook, while near the brook was a tree bearing the date of 52 years, near that stream, set slightly south of our line.

Q. To what year would that count?

164 A. About 1830; running south 60 rods there was no timber scarcely in the line — post and stone at that point; from that we run west, crossing the turnpike south of the red house at the spring; I measured over to it; we was 52 rods south of the spring.

Q. 52 south of the spring?

A. Yes, sir.

Q. Describe at that point where you were south of the spring—whether there is a ravine and a stream coming down into Roaring creek.

A. Yes, sir; that spring and some other springs collect together and come down there some little ways and gather up other water, and it is quite a little rivulet coming down the break in the side of the mountain; at about the official distance with some little excess we found a stone corner; from that I run south 33 rods to another stone corner southeast of the Charlott Ruston; continuing the line westward—though I think from that point I came the other way—but continuing the line west from that point on its official courses and distances at about the proper distance with a small excess there was another stone corner; from that we run south 52 rods to

165 the stone corner, the southeast corner, of the Daniel Reese.

By Mr. RYON:

Q. 52 rods?

A. 52 rods; the official difference between the Charlott Ruston and the Dan'l Reese, after taking into account the offset at the northern end of sixteen rods, would make that offset 52 rods on the southern line of the Dan'l Reese. I found four old marked line trees, counting back 58 grains.

Q. 58?

A. Yes, sir; one was a gum, that was difficult to count; two yellow pines, that were plain to count; the other had been burnt; it had been boxed and burnt; that we counted back to 1824 about the south line is short of the official distance.

Q. Did you do any other surveying at that time?

A. I run the south line of the Lewis Walker and William Elliott part way, not all the way. I found some one or two original marked line trees on that line; I run the line between the Lewis Walker and the William Elliott; I began at the stone heap south of the line of the John Reynolds and run that line across its official courses and its official distances, which is 112 rods; at one hundred

166 and eight and some tenths, I think 108.4, we came to a cor-

ner on the north line of those older surveys on the south 3 or 4 rods from the——

Q. You mean the older tracts bounding them?

A. On the south.

Q. Not the official La Farer tracts?

A. No; I think they were Brooks and those below; that is my recollection without reference to my notes.

Q. When you come, starting from the post by the pine at this point and run to the southwest corner of the Richard Martin, what trees were found on there were still standing?

A. Well, the old line trees were all down, except one at about 150 rods; I think I have it 150 rods; our chain man was not very accurate, as I found afterwards by chaining some of the lines over myself; I found the chaining had been a little loose; there was a yellow pine standing with a blaze on four sides; it was standing slightly north of the line of the Martin, I think; I didn't measure the offset; I think the blaze on the south side either on the south or west; I counted both; it was dead; I got 87 grains; it had been dead a year or two; it was also marked as a corner for some adjoiner surveys that came in there

167 By Judge LYNN:

Q. By grains you mean growth, do you?

A. Growths; yes, sir.

By Mr. WOLVERTON:

Q. The other trees, four or five—they had been testified to as found by Mitchell and others—had disappeared.

A. They were broken down, some of them, I think; the butts had been carried away from there, the stump bearing evidence of an old marked line tree.

Q. Assuming that these trees, four or five or six in number, were there, as testified to by the plaintiff's surveyor in this case, do you not consider, as a surveyor, the southern line of the Richard Martin located upon the ground as laid down on this map (refer-ing to map)?

Objected to.

Q. You saw these stumps of these trees that plaintiff's surveyor testified to counted to the date of the survey?

A. I counted a rock oak and it showed the old mark in the stump, 87 grains, yet, and was dead.

Q. Which rock oak do you mean?

A. It was along the southern line. I don't know just what distance now.

168 Q. Assuming that the trees were there, as testified to by Mr. Cochran and Mr. Mitchell, as found by them, I ask you whether, as a surveyor, the southern line of the Richard Martin is established as laid down on this map (refer-ing to map)?

Objected to.

—. From your examination of the marks upon the ground, and from the official papers which you had in your hands when you were there, as a surveyor, how do you say the southern line of the Richard Martin is established on the ground or was established by the surveyor in 1793?

A. It was established by carrying their southern line and its western line to their intersection.

Q. Would that intersection be at the point where they meet on this map (referring to map)?

A. Yes, sir; that is the only rule that ever I became acquainted with for closing a survey of that kind.

Q. What effect has the adoption of the post by the pine as a monument on the northern line of Ebenezer Branham in 1793 in connection with the northeast corner of the chestnut on the ground?

A. We generally understand it to be the same as though he had made it.

Q. The same as if he had marked the tree from that survey?

169 A. Yes, sir.

Q. Then is the northern line of the Ebenezer Branham —, or how was it located on the ground? What is its present proper position, from your experience as a surveyor and from the monuments you found and the examination of the line you made when you were there?

A. It would have to be continued--its official course from the marks found the whole length of its line, continuing in its official courses and distances from any marks that were found.

Q. Where surveys were located originally by a surveyor and run upon the ground as a block how are they located now; how should they be located now?

A. In determining the outline it should be located as a continuous block still.

Q. What effect has the finding of marks upon one tract of a block upon the rest of the block?

A. We generally regard a mark anywhere on a block of survey as covering the whole block the same as if it was but one tract.

Q. Finding a monument bearing the date of a survey on the ground of the block of surveys what effect has it upon that line?

170 A. It has the effect of holding the whole line in its official position.

Q. Have you any difficulty as a surveyor in establishing the north line of the William Elliott and the Lewis Walker by monuments on the ground?

A. Not by holding to its official courses and distances.

Q. Have you any difficulty in establishing it by monuments on the ground?

A. No, sir.

Q. State how.

A. The southern line being — middling well established line, and the northern line of the Ebenezer Branham being an established

line, the whole northern line must be established by monuments found on any part of it.

Q. Could or could not the northern line of the William Elliott, which is one of the La Favor block, be carried north of the position on the map now before you?

A. I have never become acquainted with any rule of location that would allow me to deviate from the monuments found.

Q. What would be the effect of a location such as claimed by Mr. Cochran; what would be the effect upon the shape of the surveys? You heard Mr. Cochran testify?

171 A. Yes, sir.

Q. You have seen the map?

A. Yes, sir.

Q. What would be the effect upon the contour of the surveys and the formations of the block as returned by William Gray?

A. It would destroy the shape of both blocks and create confusion in the location of both.

Q. William Gray returns in 1793, or March the 28, 1794, that he made a straight line with a certain bearing by these two monuments here (pointing) along that line to that point. Would the location claimed for it by the plaintiffs make that line?

A. They would be put in three different courses.

Q. Three different courses where he has but one?

A. I think there is a slight bend—change of course at the corner of the Lobdell—that it would give it two.

Q. You have stated that the southeast corner of the Richard Martin is fixed by monuments upon the ground at the point of the intersection of the line between the Lobdell and the Martin and the line run by the monuments at the south of the Martin?

172 A. Yes, sir.

Q. If the southwest corner of the Richard Martin is fixed by monuments on its southern line by the post by the pine with the line run from the north between the Lobdell and the Martin and the Richard Martin three days before the Lobdell into the land office and the power of the deputy surveyor exhausted as to the return, does that assist a surveyor in fixing and locating the southern line of the Lobdell?

A. It would; frequently a surveyor has no other method of reaching an old survey except by following the lines of a younger until he would find a monument that would fix and hold it.

Q. I understand you to say you found evidence along the line you run from this post by the pine containing the course returned by Gray and surveyor, who had been there 50 or over 50 years ago?

A. Yes, sir.

Q. At different times?

Ans. Yes, sir.

Q. You found marks along that line where, in 1814 or 1815, some surveyor had been running these lines that you run?

A. Very near the same line.

Q. On the south of the Lobdell you found trees still standing?

A. Yes, sir.

173 Q. About 55 or 56 yrs. old?
A. 57.
Q. And at the Joshua Bean you found an old tree cut down and a log which is there yet bearing marks of an old survey?
A. Bearing marks of an old survey.
Q. And going along this line east, rough or smooth survey?
A. A portion of the way it is very rough.
Q. From the post by the pine along the south line toward the west after you leave 150 perches you are going alongside of the mountain; describe the character of that line.
A. It is very rockey and rough.
Q. That is the point at which Abram Shipman said that the surveyor who could go over it without breaking his neck ought to have a premium?
A. I think it is.
Q. How is the line on the lower side of the Lobdell?
A. The lower part of it rises gradually along the side of the hill, not so rough; but speaking of the line of the Bean and Lobdell, it is pretty rough and very steep.
Q. Just after leaving the southeast corner of the Lobdell or the southwest corner you found an old broken-down line tree, did you?
174 A. Yes, sir; one that had been boxed.
Q. Could you count it?
A. I think it was so much decayed that we could not count it, from a casual examination of it; we made no attempt to.
Q. Did it or not bear the appearance of having been boxed many years?
A. It had the appearance of having been boxed when green and had grown several years afterward, and had been cut down long enough to be considerably decayed.
Q. The southeast corner of the Lobdell, at that point you found a stone heap; are there not two or three different stone heaps made by different surveyors at that point?
A. I think there is.
Q. Is there any timber on that part?
A. Very little; no old timber.
Q. Does that whole country on this side of the valley along there bear the appe-rance of having been totally destroyed by fire?
A. It had all been burned off and grown up with small brush.
Q. Did you see any brush higher than your head?
A. Yes, sir.
Q. That wasn't burnt dead?
A. Yes, sir; it had all been burnt.
Q. Did you see an abundance of pine knots and the remains of timber around there?
175 A. I saw the remains of timber that had been destroyed there.
Q. From that point, the southeast corner of the Bean, putting your compass at the proper bearing, the bearing of the south line of the Bean, would it not point you to that cove in the mountain?

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Q. Is there any timber on that part?

A. Very little; no old timber.

Q. Does that whole country on this side of the valley along there bear the appe-rance of having been totally destroyed by fire?

A. It had all been burned off and grown up with small brush.

Q. Did you see any brush higher than your head?

A. Yes, sir.

Q. That wasn't burnt dead?

A. Yes, sir; it had all been burnt.

Q. Did you see an abundance of pine knots and the remains of timber around there?

175 A. I saw the remains of timber that had been destroyed there.

Q. From that point, the southeast corner of the Bean, putting your compass at the proper bearing, the bearing of the south line of the Bean, would it not point you to that cove in the mountain?

A It would point toward that cove.

Q Then the surveyor, in 1793, ran in that direction until he came to that ledge?

A. Yes, sir.

Q. Then you were not obliged to g- over that ledge of rock, but continued along the south of it?

A. The course of the Bean would have carried us up over the ledge of rock.

Q. Would any practice among surveyors, in your experience, justify the running or changing of that course from any monument on the southern line of the Martin to an intersecting point north of its intersection there (pointing)?

Objected to.

Q. Were you on the northern line of this tier (pointing)?

A. Only a portion of it.

Q. This line is well established—the northern line of that block?

A. As far as I run it, I found no difficulty.

176 Q. You found, as I understand you, the southern line of the Francis West well established on the ground?

A. Yes, sir.

Q. You found the line between the Francis West and the Martin well established on the ground?

A. Yes, sir.

Q. You found the line between the Martin and the West?

A. There was no original line trees.

Q. The Francis West and the Houston were surveyed on the same day, were they not?

A. I believe they were.

Q. Not many days before the survey of this Brush Valley block?

A. Only a few days.

Q. And before the surveyor returned the Richard Martin into the land office and exhausted his power over that warrant and at the time he had it, had he not all of the warrants of the Brush Valley block in his hands? From the official records you have examined can you state.

Objected to.

Q. Mr. Prescott, what does the dotted line extending eastward from the northeast corner of the Samuel Lobdell, its southeast corner eastward, indicate to you as a surveyor?

177 A. When we find a dotted line upon a draft and both sides of that dotted line is marked vacant, we always mean it to understand a line run upon the ground — a marked line, of which the surveyor had knowledge when he made the return of the survey that it calls for. I may say further that the only exception I ever found, or only place I ever succeeded in finding where such a line was shown was at the east end of the Brantam. I can't think of a single instance where I found such a dotted line shown running through vacant land but what I have succeeded in finding them marked.

Q. You have found monuments on the southern line when you first were there; when did you return?

A. I went back in January following.

178 Q. January, 1883.

A. Yes, sir; when I was there in November, however, after leaving the swamp and going westward, I found a marked gum tree a little south of the line, bearing an old mark; probably I spoke of it; I went back to that gum tree.

Q. Now, tell what you found when you came back and examined the line that you had previously run from the post by the pine.

A. I came back to that gum tree just west of the stone that represented the Billington and the Reynolds and I found that tree counted to the date of 1814, and an old mark that I could count very distinctly, all except a few grains; there was a little decayed streak in it that counted back to 1793; the two marks were partly overlapping each other.

Q. That was how far west of the maple sprout corner at the swamp?

A. Well, there was no maple sprout.

Q. Not the maple sprouts, but the stone corner.

A. I think it was about six rods; it was very snowy and bad when we were there; we didn't open our chain at all.

Q. As I understand, you counted that tree and it had been marked in 1814 over an old mark—on top of it?

A. Yes, sir.

Q. Explain that tree and the marks upon it.

A. The marks were on both sides of that tree east and west, and both marks overlapping each other partially; the last mark

179 the grain showed 68 years; the older one was in it, merely notched deeper, with a small portion of it decayed, so that it left it a little uncertain as to the exact date, but I have no doubt was the mark of 1793. The tree was hollow, so that when we took a block out of it the chip cut through on it on the one side and one on the other; we could see clear through it until I intersected the north and south line There was two stone corners six rods apart there, north and south, made by different surveyors, and I intersected that north and south line at a point between the stone corners; at that point I found a well-marked witness, to the corner, counting back to 1793; that witness stood 25 feet south and six feet west of the line—about that.

Q. Did that witness point to this corner to any object?

A. Not to either of the corners where I was.

Q. What did it point to?

A. It faced a southerly direction—faced a maple stump that had the appearance of being cut off, out of which was a sprout grown up that was three or four inches—probably four inches—in diameter.

Q. What did that sprout count back to?

A. I think I counted it at that time, or when I was there in May afterwards, and I counted 35 grains.

Q. Showing that it was 35 years old?

A. Yes, sir. South of that maple and facing northeastward

toward it was another gum with a mark on the northeasterly
180 side of it, a single axe mark counting 35 grains.

Q. What date would that be?

A. That would carry us back to 1847.

Q. So that near to this point you found some one had struck an old axe in the tree which counted to 1847?

A. Yes, sir.

Q. Who were with you when you found these original marks?

A. Mr. West and Mr. Boyer.

Q. Describe the appearance of the tree and how you came to discover the witness to the corner.

A. In examining the timber I found three well-defined axe marks; the two upper ones we could see the cut of the axe in the bark; the lower one wasn't quite so distinct. The wood—the increased growth of the wood that always follows a wound in a tree had caused a swell that was pushed out through those notches. There was a considerable swell right on where each one of these notches were, so that it was visible. The bark was of entirely different appearance from the surrounding bark. Both of the two upper ones, the cut of the axe was plainly visible.

Q. Just describe the taking of them out and who took them out.

A. Mr. West done the cutting; he began at the lower one that was decayed from the inside. There was a hollow streak run up
181 behind the bark; it was decayed both ways towards the heart and outward. The wood was about an inch and a half thick, in the growths of wood over the lower mark, and the inside decayed. He then cut the next one and that was decayed, but not so much; he then cut the upper one and in that the wood was comparitively sound—not nearly so much decayed.

Q. Were the axe marks visible?

A. We found them so.

Q. There was only one side?

A. Only one side of that tree marked.

Q. Now, in the other tree?

A. We cut into that; I am not certain whether there was any block taken out of it or not.

Q. You boxed it and not blocked it; describe that corner.

A. Those trees both pointed toward the maple stump that I have already described, and the sprouts had grown up out of the new wood that had surrounded the old stump, the maple that had been cut off; it bore very much the resemblance of having been cut off, the manner in which the growths closed up around it, the new growths that had closed up around that stump; the old stump had left a hollow, and I think on the southwesterly side was a sprout growing up around it.

Q. Have you any doubt of that being marked an original corner in 1793?

A. I have not any.

182 Q. And six perches west of that you found a tree that had been marked in 1814 or '15, and under it another?

A. Yes, sir.

Q. Under that mark of 1814 or '15 you believe to be a mark which counted to 1793 also?

A. Yes, sir.

Q. That is marked east and west?

A. East and west.

Q. At this point, near the swamp, the ground is moist, is it not?

A. Yes, sir.

Q. It is a swamp of two or three acres?

A. Probably more; it is swampy a considerable distance from east and west; but I don't know how wide it may be.

Q. Are there not abundance of maples and gums in that country?

A. There are several there; small maples standing around, and some larger ones.

Q. Along on the rocky and dry side of the mountain maples are not usually found?

A. They are not usually so plenty, and especially where the fire has generally burnt over it.

Q. Then you found along the south line of these tracts that some surveyor in 1824 run and located the south line of the Reese just as it is in that map (pointing)?

A. We found four trees well marked; two of them we counted, showing 58 grains back to 1824.

183 Q. At different points back along the lines you found where other surveyors run these lines?

A. Yes, sir.

Q. Mr. Trescott, perhaps it is not very material in this case, but some surveyors have testified that the surveyor began at the Frances West and run to the Daniel Reese; others have changed this line and stated that he run that (describing) way. Give your opinion, from what you saw on the ground and the papers you had in your hand, where the surveyor commenced in 1793.

A. Having run but a small quantity of that line, of course I have no knowledge how these offsets are situated at the summit of the mountain or at the line on the Billington and the Reynolds; at the Billington and the Reynolds, the north corner, the corner of the Billington is on the extreme north brow of the mountain; to

184 have continued it west he would have run down over the north side; that there is, down over a little block or ledge of rocks, broken ledges and very stony, and then running westward right along the flat; to have run it eastward he may have run it off the same way as the other. I didn't pay any attention to that. At the corner between the Reese and the Charlotte Ruston the corner of the Reese is right on the summit of the ridge; there is a wagon road between that and the south side, and the corner of the Charlotte Ruston is down over the north side of a steep bank; to have continued from there in his course would have run him down the steep mountain side and far from where the corner of the Daniel Reese really is. The best reason that I can discover for his having began at the eastern end is that he had begun at the westward and run his line from the Daniel Reese, when he got to the east corner. Had he continued the same course without any off-set for two or

three miles, he would have still been substantially on the same ground. After making all those offsets, and on the summit of the mountain, I have his course north 80 degrees east; he would have maintained the summit of that mountain without any change and carried him clear through to the corner of the Billington without any change of course.

Q. There would have been no occasion for offsets at all if he had commenced at the west?

A. It is only a matter of theory, of course.

Q. Is the ground along there favorable for a continuous line?

A. I saw nothing in the way of it; it must have been *the* those other courses are situated along the first tier.

Q. In surveying is there any rule as to which side of the surveyor the land should be kept?

A. Well, it was a custom among the old surveyors, and
185 books generally recommend it, to keep the land to your left hand.

Q. So in running from the Francis West westward he would have had his land to his left?

A. Yes, sir; but — rule I don't suppose is always followed.

Q. What is the rule as to plotting—what direction do you plot in?

A. Well, we usually begin at the west end, at the left hand, facing the north, and plot eastward.

Q. Plot as you view a map generally; plot to your right?

A. Yes, sir.

Q. If the yellow pine were intended at all for any corner and was a corner at 150 perches, either of the Martin or Branham, the Martin particularly, how would they close the survey there?

A. If that had been the corner called for or intended to be used the only method I know of closing would be to take such courses as to run from there to the northwest corner and close these two surveys by a straight line between them.

Q. If there were monuments for that tract?

A. It is not called for as a monument: not called for as a corner.

Q. Just explain, as you have had a great deal of experience continually as a surveyor, how trees are marked and how corners are marked, how witnesses to the corners are marked, and inform the jury what a witness to a corner is.

A. Different surveyors have adopted different styles of marking; some line trees are marked with simply a blaze; others are marked with two notches on opposite trees—that is, line trees; some surveyors also adopt a habit of marking their corners the same as they do their line trees. Usually, where line trees are marked and blazed, there is a notch or two below it, but in all these surveys I have found those marked with three notches.

186 Q. On these surveys?

A. These surveys. I didn't find any original corners except the gum, the gum at the northeast corner of the Branham; that was three notches. The gum witnesses were generally marked the same as the corners, the three notches, and if that was the style that surveyor adopted he had them all marked alike.

Q. The surveyors in 1793, Gray and Donnel, how did they mark a witness to a corner?

A. I generally found their mark was three notches in all the region extending off towards the Lehigh, where they had charge of the location. I found their corners, I believe, with the exception of a single tract. I have no recol-ection now of finding a mark of any other kind except the three notches.

Q. And that applied to witness- of corners as well as corners?

A. Corners and witnesses both.

Q. Describe to the jury what a witness is.

A. Well, a witness is a tree standing at a greater or less distance from the corner, usually the nearest tree, and is marked with three notches on the side directly pointing towards the corners; sometimes they are every side of the corner, the nearest tree. I find it is a rule they never went past one tree and marked a second one, but to the one nearest to it.

Q. What was the purpose of it?

A. So that if the corner itself disappeared that the witnesses might,
some of them, remain to indicate where the corner would
187 have been. The rule in marking the witness was such that
by cutting the tree down in the manner indicated it would have fallen on the corner, so on opposite lines of the intersection it would show.

Q. Describe a reference tree.

A. Surveyors have different habits of marking trees for different purposes; they usually denote some point or distance—some stopping point—and they mark their reference trees on four sides just with a blaze.

Q. What was it for?

A. Well, I suppose the object of it was they could catch sight of it more readily in returning to it.

Q. See it from all sides?

A. Yes, sir; that is my habit I know now.

Q. Describe how this pitch pine or yellow pine 150 rods on the north line of the Branham from the post by the pine about 1.7 perches from it—describe how it was blazed.

A. My recol-ection of it is there was a long blaze on each of the four sides; I think they run all together, but some thought there was more than one stroke of the axe; probably might have been three separate parts.

Q. Did you run the Sharpless survey?

A. I did.

Q. Just state what date the Sharpless was run upon the ground.

A. My recollection is 1824.

Q. Did you find it located upon the ground?

A. I did.

188 Q. I hand you official survey of the Benj. Sharpless according to the survey of the 9th day of January, 1824; where did you find that Sharpless corner?

A. I found the corner of the Benjamin Sharpless to be a pine

150 rods west of the post by the pine on the south line of the Richard Martin in 1824.

Q. Is the Sharpless marked upon the ground?

A. I found nearly every corner of it standing—all of its lines; more or less of them.

Q. Does the Benjamin Sharpless lay right on top of the Branham or very nearly?

A. I think all of it.

Q. All of it lies on the Branham?

A. At one point we was very near the line of the Andrew Porter; I measured across to it.

Q. That is a survey of 1824; does it call for this identical yellow pine tree blazed on four sides as a corner?

A. It calls for a pine; and all of our lines starting from that pine running the official courses and distances of the Sharpless, we found all the other corners in place, and continuing on around came back to the pine.

Q. Did you find witnesses surrounding it?

A. We found a witness of 1824 and another of 1830.

Q. Before this corner was marked as a corner for the Sharpless what, in your opinion, was it marked for?

A. As a reference tree for a surveyor.

Q. In 1794?

A. In 1793 or 1794; the tree being dead when I was there, in 1882, I counted 87 grains.

189 Q. On the south of the Lobdell did you see a chestnut oak which had been blocked?

A. I saw it; yes, sir.

Q. Was it in such a condition that you could examine it?

A. There was no trace of any mark on it; the west side had the appearance of a block being taken out and the eastern side had the the appearance of being hewed out—scored.

Q. Was that on the line you run?

A. I think so.

Q. Do you recollect just before you came to the southwest corner of the Martin survey where a tree had been destroyed?

A. At that time; I don't recollect of it afterwards; when I was there in May with Mr. Moore he called my attention to the fact that he had seen such a tree there and hunted for it and could not find it.

Q. What official papers had you in your hands when you did this surveying?

A. Before I went onto the ground I examined the blocks and warrants; I didn't carry them with me; I had seperate official copies of nearly every survey that was represented on this official map.

Q. Some fifty?

A. We had a large portion of them; all that was embraced in those blocks and those immediately surrounding the Le Fevre block, and I think we had seperate official of the Le Fevre block and its surroundings, and also a connected map; I think this is not the one, but one very much like it; there is one or two tracts more on these.

190 Q. From your experience as a surveyor and your examination made upon the ground and from the official papers you have examined and had in your hands when you made this examination in 1883, where do you say the surveyor in 1793 located the southern line of the Brush Valley block of lands?

A. He located it from the post by the pine to the gum witness at the Branham and continued his official course westward.

Q. As represented on that map?

A. Yes, sir.

Q. Give *is* your reason for that, Mr. Trescott.

A. The first reason is the marked line upon the ground and probably the best one. The second one would be the general formation and contour of the ground as such.

Q. What do you mean by contour of the ground?

A. The southern line of it conforms with the general shape of the country, so that he could pass through these breaks and keep on some probable grounds than he could to have run a straight line. The Indian path is shown there with so much certainty that it would be

191 almost impossible for him to put it there without he had been on the ground; he also shows a stream of *of* water on the Reynold's as crossing that land from no other point or any other point that I could discover; he could not have been told whether it would have been on one side or the other; it might have been on the Myers just as well as on the Reynolds if he hadn't been there to have seen it.

Q. Is there any reason at this end to convince you?

192 A. Well, the showing of the Samuel Lobdell that the line was extended east from its southern corner. It is scarcely worth while to speak of the northern corner, because that is undisputed, the southern line of the Samuel Lobdell showing that the line run east from it. I regard it as evidence showing that the line was run east and the line on the ground showing a well-marked line to the post by the pine and the gum witness. It is to my mind conclusive evidence of where he done his work.

Q. You have spoken of a ravine on the south of the Mary Myers and that your line of the other surveyors ran within four or five rods south of that spring.

A. Yes, sir.

Q. If the line were to be placed where the plaintiffs claim it should be or north of it, where would it have crossed that spring?

A. It would have crossed that stream down where there was quite a little riveulet.

Q. The ravine being as large as that one and a break in the mountain, would he not as likely have put the run on the south side of the Myers as well as there, if he had not been there?

193 A. Well, they are similar on the south; it is a little larger.

Q. The surveyor returns no stream south of the Mary Myers?

A. No, sir; because the line runs south of it; but if it had been north of it it would have been indicated; on the Thomas Ruston is the same course there; there is a spring heads up very near the Thomas Ruston; if he was running down on the lower line, the line

claimed by the other party, it would cross that stream of water also, and the Ruston shows no stream there.

Q. When you find that the surveyor returns a survey into land office with a stream running across the line, and you, upon an examination of the line, find a stream located in its proper position, what does that indicate?

A. It is very good evidence that he run his line.

194 Cross-examination by Mr. RYON:

Q. The first time that you were ever on this body of lands, as I understand, was in November, 1882?

A. Yes, sir.

Q. You live in Huntingdon township, Luzerne county?

A. Yes, sir.

Q. How far from this body of lands?

A. That I don't know, sir.

Q. Sir.

A. I don't know what the distance is.

Q. Is it so far you can't tell?

A. I have never measured it, if you want the precise distance; I have not looked over my maps to ascertain.

Q. How far do you live from Sunbury?

A. About 57 miles.

Q. How far is it from Sunbury to these lands?

A. I don't know; I travelled part way by railroad and part way by foot—16 or 18 or 20 miles.

Q. Can you tell pretty nearly; some twenty-odd miles?

A. I think about 20 miles.

Q. You live about 90 miles from these lands?

A. I don't think that far, but to go by the way of Sunbury it would be that far.

Q. You had never done any surveying over these lands or along it until 1882?

A. Nor close by there.

Q. Who employed you to go there?

A. I was in the employ of Mr. Clement.

Q. Ira T. Clement?

A. Yes, sir.

Q. You began work at what you call the gum corner?

195 A. Yes, sir.

Q. The northeast corner of the Lewis Walker; what did you find there?

A. There is an old gum tree standing there bearing some old axe marks, an old boxed witness, and a large stone by a tree painted red.

Q. Did you count the gum?

A. I don't think I did or could.

Q. I don't think you could; I have never seen a surveyor could count a gum tree yet any more than a mahogany.

A. The witness was standing there; that showed the same date I presume, that the corner would.

Q. Do you know what the date of the witnesses were?
A. The axe marks, as nearly as we got at it; we could see some trees where it had been.
Q. Did you count the witness.
A. We counted what we could get at.
Q. What did you count?
A. We got about 1793.
Q. About it?
A. Yes, sir.
Q. How near to it did you count?
A. We got 88 and 89 grains.
Q. In the witness?
A. Yes, sir.
Q. You run from there northward?
A. Yes, sir.
Q. Did you run on the line?
A. There is a marked line.
Q. Did you count any trees on that line?
A. I did; one or two trees.
Q. What did you count it?
196 A. I counted one or two trees that was 50 years old.
Q. You found nothing original there?
A. I didn't.
Q. How far did you run that line?
A. We run that line across 56 rods along to the Francis West.
Q. What did you find at the end of that line?
A. A stone heap.
Q. That was not a corner called for by any survey you had in your hands?
A. No, sir.
Q. At the stone heap, what course did you run?
A. Run the course of the Francis West.
Q. What course did you run?
A. I wasn't using the compass; Mr. Boyer was.
Q. What course did Boyer run?
A. I think the original course is north 65 degrees east.
Q. You didn't run on that, did you?
A. The original was—no, north 69 degrees east.
Q. He didn't run north 69 or south 65 west?
A. He run north 69 degrees east with the proper variation.
Q. What was the proper variation?
A. I think he run four and a half degrees.
Q. Tell the jury what course he run.
A. That would be north 73½ degrees, I think.
Q. You run that and then you varied four and a half degrees from the official course?
A. Mr. Boyd claimed——
Q. I don't care what he claimed.
A. Well, he had the official maps that gave him the course,
197 and he put on the variations that would carry him on the marked line.

Q. You were running then westward.
A. No, sir; we were running eastward.
Q. What did you find on running eastward?
A. Running eastward we found two or three original marked line trees.
Q. What did they count to?
A. 89 grains.
Q. What did they take you to?
A. To 1793.
Q. How far did you run eastward?
A. Some 20 or 30 rods; 30 or 40.
Q. Then where did you go?
A. Back to the stone heap.
Q. What next?
A. I run from there to the post by the pine, 73½ degrees west.
Q. What did you find along there?
A. Found some old line trees.
Q. Did you count them?
A. I think we counted some of them.
Q. What did they count?
A. I didn't find any that counted to the date of the survey, and I made no note of it what they did count.
Q. You found some trees, but none that counted back to the date of the survey?
A. No, sir.
Q. In running from that stone heap to the other stone heap, which you call the post by the pine, you found no original marks?
A. No, sir. I didn't find any; at about 39 rods we come into the Catawissa road, and the line was in the road the rest of the way except 39 or 40 rods.
198 Q. Where in that line did you find any original marks?
A. On the west line of the Francis West.
Q. How far from the stone heap?
A. About six rods.
Q. Six rods north of the stone heap you found a tree; what was it?
A. A yellow pine.
Q. What did it count?
A. 89 grains.
Q. That is in the fall of 1882?
A. Yes, sir.
Q. November?
A. November, 1882.
Q. That would take you back to 1793?
A. Yes, sir.
Q. You continued on north on what you claimed to be the west line of the Francis West?
A. Yes, sir.
Q. What did you find on that line?
A. I found a number of old marked line trees; most of them had been cut to the post—cut out; there was but one or two out of

which we could get a date; we found one that was still green; (they had been badly cut to pieces); that counted 89 grains.

Q. That is back to 1793?

A. Yes, sir.

Q. How many rods did you continue on that line?

A. One chainman made about 382—282, I think.

Q. What did you find at the end of that line?

A. We found some stone piled in the old stump.

Q. Found no corner that you could count?

199 A. No corner.

Q. No witness?

A. Nothing standing—no timber.

Q. You continued on northward; what course did you run the next line?

A. About north one and a half west.

Q. What was the official?

A. North five west.

Q. Run on a variation of 4½ degrees?

A. I think so.

Q. What did you find on that line?

A. There was some old fallen line trees; there was a green tree, I think, in the line.

Q. You found nothing, then, on that line that you could count?

A. Nothing you could count.

Q. To determine the date of the survey?

A. No, sir; not at this time.

Q. What did you find at the end of the line?

A. A stone heap.

Q. At this time did you find, or at any other time, any marks that you could count?

A. No, sir; I mean original marks, at that time.

Q. You found a stone heap at the northeast corner of the Martin?

A. Two rods short of its official distance.

Q. Any witnesses around that?

A. One old chestnut oak witness.

Q. Did you count it?

A. I attempted to; it had been blocked some years ago and was decayed; the older marks could not be counted.

Q. Nothing there to enable you to determine, or that was original?

200 A. No, sir.

Q. Did you run west from that point?

A. North 87 degrees west, with a variation.

Q. What variation did you run on in that line?

A. I wasn't using the compass; I only noted the official courses.

Q. Do you know what variation he adopted on that line?

A. He generally used four and a half.

Q. On that line?

A. I don't know that he did any more than what he said about it.

Q. What distance did you run on that north line?

A. We ran about 192 rods, I think.

Q. What did you find at the end of 192 rods?
A. Found a stone heap and a pine stump.
Q. The Martin calls for a pine at that corner?
A. I believe it does.
Q. Did you find anything on that line counting back to 1793?
A. Nothing standing at the present time.
Q. Where did you find any original work on that north line?
A. I found none there—that is, all I run on the eastern part of that line.
Q. As I understand you, from the time you left the old gum down on the northeast corner of the Walker until you got to the stone heap, which you fixed as the northwest corner of the Richard Martin, you found but two trees that you could count back to 1793?
A. A stone heap that somebody else fixed; I didn't fix it.
201 Q. Well, the point where you left off your survey?
A. Yes, sir; at the point—the northwest corner of the Martin.
Q. Two trees?
A. Yes, sir; between them.
Q. That counted back to 1793?
A. There is others on the southern line of the Francis West.
Q. What did you find at the place you located as the post by the pine?
A. There is an old pine stump there—a post.
Q. The post is not very old, I presume.
A. I don't think it stood there many years.
Q. Is there anything there to indicate a corner of 1793?
A. Nothing at all.
Q. And the nearest point to that you found any original work was six rods further north?
A. Yes, sir.
Q. Running east from that point you found no original work down to the place or stone heap which you fixed at the northeast corner of the Beasley?
A. Somebody else fixed it; I found it there.
Q. You found no original work there?
A. I believe no original tree left standing in that line.
Q. Is that stone heap by the pine corner by the pine stump at any place returned on any official draft that you have seen as the post by the pine?
A. I believe that to be the post by the pine.
Q. I didn't ask you that; I asked you if that place where
202 you found that stone heap by the stump is at — point where any surveyor has returned a post by the pine on his official work?
A. I believe it is the southwest corner of the Francis West which calls for the post by the pine.
Q. You found the western line of the Francis West as you fixed it 282 rods long?
A. Yes, sir.

Q. Have you any official survey that calls for that length of line there?

A. I have none. We found no northern corner on there. We had two original lines that makes the intersection at the post by the pine.

Q. You found the line counting about 50 years from the stone heap between the two stone heaps on the south of the West?

A. We found the south line of the Francis West originally further east.

Q. You stated that that west line is 32 rods longer than the deputy has returned it?

A. Yes, sir.

Q. The place where you place the southwest corner of the Francis West is 32 rods further south than your original draft calls for that corner, is it not?

A. It is just where the official draft calls for it—running on the southern line of the Francis West.

Q. I hand you an official draft. What is the length of that western line of the Francis West?

A. 250 perches.

203 Q. Did you make that western line of the Francis West 250 rods long?

A. I found marks on the ground showing that somebody had found the northwest of the Francis West at such a place, making it 280 perches.

Q. Do you know at which end that mistake occurs; is it in placing the southwest corner or the northwest corner?

A. It can't be at the southwest corner, for the south line is original.

Q. How do you make it original?

A. It counts to the full date of the survey.

Q. You have already stated to the jury that you run west from the stone heap which you fixed as the northern line and you found no line?

A. I stated that I run northeastward from that stone heap and found the Francis West original.

Q. State to the jury whether there is a mistake in that line.

A. I don't know whether there is a mistake or whether the deputy surveyor done it on purpose.

Q. Do you assume, then, that the official deputy surveyor, under oath, in making his survey, returned as much as you would take, and deliberately perjured himself in returning a line 250 rods, which, in point of fact, was 282, and he knew it?

A. We find it so frequently that we have got to say that he either made a mistake or perjured himself.

Q. You say he either made a mistake or perjured himself?

A. Yes, sir.

204 Q. One or the other is inevitable?

A. Yes, sir.

Q. Because you didn't find the line upon the ground to correspond with that official return?

A. No, sir.

Q. You find, then, an excess of 32 rods which is not called for by any official survey you have seen?

A. Not called for by any.

Q. What is the age of those marks that you say you found on the south side of the Richard Martin? Are they the same age as the line you found on the west of the Francis West?

A. I have not stated that I found anything there that was green; the trees were all dead.

Q. Then you found nothing on the south side of the Richard Martin?

A. Nothing that I could count beyond 87 years; those trees are dead.

Q. You found nothing, then, on the south side of the Martin that you could count as original work?

A. Nothing standing now.

Q. Then, as I understand, you attempt to fix the southern boundary of the Brush Valley lands by a post by the pine, as you call it, running from that point?

A. I would use that in determining the location of other surveys.

Q. Would you make any allowance for the mistake or perjury that you found there by the post or by the pine?

A. I don't understand the question.

205 Q. Would you make any attempt to correct the mistake or perjury you found by the post by the pine?

A. I found no reason to make any there.

Q. You found, though, that there was a mistake in fixing that corner there, or there was deliberate perjury by the officer that made the return?

A. Oh, no; either a mistake in distance. I don't say that he perjured himself. There is a difference in the distance on the ground from what he has put on paper. I don't know whether it is a mistake or intentional.

Q. It is one or the other?

A. Yes, sir.

Q. As a matter of fact, it is not true?

A. No, sir; the paper is not true, as compared with the marks on the ground.

Q. Then, instead of attempting to correct that error, if it is an error, you adopt it?

A. Governed by the errors; you had no right to correct it.

Q. If you had a right you didn't attempt to correct it.

A. There was no place we could correct it; the monuments would not allow us to correct it.

Q. And you allowed this error to influence the whole southern line that you ran there, didn't you?

A. Well, it has some effect upon it.

Q. Some? Does not that determine the course of your whole line, as you have run it?

206 A. That and the monuments upon the ground do.

Q. But the monuments are mistaken, you said.

A. Just where I found them. I didn't say that I found that corner 32 rods further south. The southwest corner of the Francis West is just where it was put by the original surveyor.

Q. I hand you a copy of the original survey. What is the eastern line of the Richard Martin, as returned, where it joins the Francis West?

A. 250 rods.

Q. 250 rods?

A. The same the Francis West.

Q. You found no marks on that side, anywhere there, that correspond in age with the Richard Martin?

A. I think not.

Q. Not a mark?

A. Only the line of the Francis West would count the same as the Richard Martin counted.

Q. The Richard Martin was laid in February, 1794, it appears.

A. Yes, sir.

Q. Do you believe, from the official paper before you, that the deputy surveyor, in locating the Martin, measured that line of the Francis West?

A. Oh, I don't know whether he did or not. I have no means of knowing.

207 Q. Let me ask you a question and see if I could furnish you the means of knowing. He returns the line there 32 rods shorter than you found it upon the ground, didn't he?

A. Yes, sir.

Q Ain't it a fact, then, that he either didn't measure the length of that line or made a false return?

A. Well, he either measured it there or adopted the same measure as he did before or he didn't measure it and adopted it. He adopted the same measure and the same monuments he had made for the West.

Q. The official work you had in your hands notified you that the eastern line of the Richard Martin was 250 rods long?

A. Yes, sir.

Q. Did you, in attempting to fix the southern boundary of the Richard Martin, regard what you had before you?

A. In getting those names confused I have lost track of the question.

Q. The line that you adopted for the eastern line of the Richard Martin was *was* 32 rods longer than the official draft called for?

A. No, sir.

Q. 32 rods?

A. I found it about 32 rods longer than the official paper called for.

208 Q. And in order to do that you adopted a stone heap without a single witness to indicate the age of it?

A. It is entirely irrelevant where the southwest corner of the Francis West is.

Q. You haven't made an answer to my question yet. In fixing the point—your starting point—at what you call the southeast cor-

ner of the Richard Martin, you started at the stone heap without a single witness to indicate the age of it?

A. We started at the post by the pine, which is directly indicated by the original lines running to it.

Q. You haven't answered my question. I shall insist upon *a* an answer for it if it takes until we get through with our temporal affair.

A. There was nothing at that point.

Q. In starting at what you call the southeast corner of the Richard Martin for the purpose of fixing the southern line of these ten or eleven surveys and the northern line of the adjoining surveys you start at a point—the stone heap—without a single witness to indicate that as an original corner?

A. Certainly there is nothing there. I didn't understand your question or I would have answered it the first time: but we determined that point by the intersection of two original lines.

209 Q. You determined that as what point?

A. As the post by the pine.

Q. In what line?

A. Well, it would be in the northern line of the Ebenezer Branham.

Q. That is a younger survey, isn't it?

A. Yes, sir.

Q. What does the Ebenezer Branham call for at the southeast—the corner where you fixed it?

A. It calls for gum.

Q. Oh, look again. You say it calls for a gum?

A. It calls for a post.

Q. It calls for a post?

A. Yes, sir.

Q. It didn't call for a gum?

A. No, sir.

Q. At the point where you started?

A. No, sir.

Q. What does it call for at the other corner—the northeast corner?

A. A small chestnut.

Q. Did you find any chestnut there?

A. There is a stone heap there and chestnut sprouts there.

Q. Chestnuts are common there?

A. There is a good many chestnuts and chestnut sprouts growing around; very little large chestnut timber left standing.

Q. You found, then, nothing at all on the ground on the southern end of the Branham?

210 A. Nothing original.

Q. Where you put the eastern of the Branham?

A. No, sir.

Q. Well, you give the jury the calls for the Branham on the northwest.

A. It calls for the John Huston and the Daniel Reese——

Q. One moment. Get the northeast call—the Samuel Huston.

A. That is on the northern line.
Q. Where is the Samuel Huston on the ground?
A. There ain't any Samuel Huston in it—ain't here.
Q. What is it?
A. The John Huston.
Q. Where is the John Huston?
A. It is the next land laying east of the Francis West.
Q. Does that call for the corner of the John Huston?
A. Well, the reference here is post by the pine.
Q. Where is that post by the pine that is called for?
A. Well, it is identified on the ground.
Q. I didn't ask you where you identified it. I ask you where it is on that official paper.
A. Well, it is about at the angle in the northern line of the Ebenezer Branham.
Q. The first call on the Ebenezer Branham calls for the post by the pine on the southwest corner of the John Huston.
A. Yes, sir; but the John Huston don't call for any such corner.
211 Q. I ask you what that calls for.
A. That calls for the post by the pine.
Q. At the southwest corner of the John Huston?
A. Yes, sir.
Q. That is called on the Branham?
A. That is called on the paper, of course.
Q. And it calls for the Daniel Reese next?
A. Yes, sir.
Q. On the west of the Huston?
A. Yes, sir.
Q. Did you find any Reese there?
A. We didn't; I suppose so.
Q. You didn't look for it?
A. We had no papers showing that there was a Daniel Reese there except the Branham showed it.
Q. The post by the pine is right there (pointing) ain't it?
A. According to this paper, yes, sir.
Q. You undertook to fix the Branham by its calls for post by the pine?
A. Well, we was fixing the location of the other surveys more particularly than we was that of the Branham—the older surveys; located them first, and the Branham would follow.
Q. Then you undertook to fix the older ones by the younger one there; is that it?
A. No, sir; not entirely.
Q. Well, it wasn't entirely. Was it part of your object?
212 A. My object was to get the course east by the eastern line of the Branham while I was there, then from the older surveys on the north determine where the northern line was.
Q. You found no marks on the Branham?
A. Nothing original.
Q. No original marks for the Branham at all?

A. No, sir.

Q. Suppose they commenced to locate it according to the calls of the Branham, you would get down to the corner of the John Ruston, wouldn't you?

A. Yes, sir.

Q. Suppose that you start according to the calls of the Branham and run to the north line of the Branham, where would you be?

A. If we would be governed by the calls on this paper we would get way down to Shamokin before we got down adjoining to the Branham.

Q. You commenced where the Branham calls for a joiner at the southwest corner, the Huston, instead of running down where you run would be 40 or 50 rods further north, wouldn't you?

A. It might be that way and maybe more than that.

Q. Would you run into the Lobdell, giving it any more than its official distance?

A. I presume so.

Q. You did not locate the Branham that way, according to its calls?

213 A. I did not suppose it had any right to go there.

Q. You did not locate there?

A. No, I did not locate it there.

Q. Why didn't you?

A. I could not find any reason for doing it.

Q. You had a reason right on your official paper; you could not find any marks to contradict it.

A. The return contradicts itself.

Q. What do you say of that call there?

A. The surveyor was mistaken as to the names he put there.

Q. How many names have you got on that paper where you started from?

A. We have got two or three—three here.

Q. In the first place, there is a mistake on your line of 32 rods.

A. The first mistake; there is a mistake in the end with the Ebenezer Branham of four rods.

Q. Then you have two mistakes on the face of that paper?

A. Yes, sir; for the calls of the adjoiner; I cannot reconcile it in any other way that I can see.

Q. You disregarded those calls?

A. Yes; the tracts of land do not appear to have been located there.

Q. The Huston was located there?

A. Yes, sir; it was a little further east.

214 Q. How would you treat those calls on the Branham there?

A. I would treat them as an erroneous call to the adjoiners.

Q. Then you treated it as a mistake?

A. Yes, sir.

Q. You have three mistakes to start on?

A. Two or three.

Q. How many of them do you disregard?

A. Well, we have to disregard the call for the John Huston and the Daniel Reese.

Q. Then you disregarded the mistaken calls on the Branham, but you have a tender regard for the mistake in the east line of the Martin, haven't you?

A. I don't know that I have any more than for the other.

Q. Why did you disregard the other and call them mistakes, as they evidently are, you say? Why didn't yon disregard the other mistakes in there?

A. The best evidence we have of any starting point is the post by the pine.

Q. You did not see any post by the pine?

A. We have two original lines running together at that point.

Q. Then you get there by running on your variation?

A. Yes, sir; from that it is not very material whether we run 230 or 250 on the Francis West, so far as the Martin is concerned, only they call for each other.

215 Q. You think it is immaterial whether you take away 30 rods of land from one man and give it to another?

A. Let me finish my answer. Unless the north line of the Francis West is originally on the ground you can take it off the north side as well as the south side; if they are both original, I would not know a way to take it from either.

Q. You started from what you call the stone heap with post in it?

A. I don't know that I seen any stone heap with a post in it.

Q. They are on the west corner of the West?

A. No; I think there was a stake drove there and two or three stones in another place. I believe I did not see any post in the stone heap.

Q. Did you start from the stone heap or stake?

A. We started from the stake.

Q. When you ran northwest or in a westerly direction from this by the stump you ran out 118 rods?

A. Considerably more.

Q. From the stone heap that you adopted for the southwest corner of the Martin?

A. Considerably more.

Q. How much more?

A. About two hundred more.

Q. How many rods did you run?

216 A. I run 318 rods.

Q. What is the official length of the line called for by the——

Q. Mr. Wescott, if you have the eastern line of the Martin or, in other words, the western line of the west on that northern line, which you assume to count back to 1793, and the eastern line on the Samuel Lobdell, either upon the ground or p-otted, is there any difficulty in telling what the length of the southern line ought to be?

A. Wait till I inquire if you mean to say that I testified to having found the northern line of the Richard Martin originally.

Q. No.

A. You have, in your question, the fact I was assuming it was there where you have the length of the line. You have the length of the eastern line of the Martin; you have the length of the Samuel Lobdell there upon the ground or plotted upon the official work; is there any difficulty in your telling the length of that southern line of the Martin?

A. Not if the eastern line is given the correct distance.

Q. Whatever the distance is returned officially it will enable you to ascertain correctly the length of the southern line of the Martin?

217 A. Yes, sir; if you don't call it but two hundred rods you could tell what length that would be.

Q. What would be the length of that line across there, according to the official papers?

A. I have not made any calculation, but I think about 208 rods.

Q. Then there is no mistake about one thing, that the deputy returned that the eastern line of the Martin was only 250 rods long.

A. He so returned it.

Q. You have no evidence convincing you that he knew it to be a false one?

A. Not that he knew it.

Q. Don't his work show that he did not know that line to be more than 250 rods?

A. Well, he has made all his papers to conform with each other as though he may not have known it.

Q. Then ain't it true that, according to his official work as returned, — were not at the southwest corner of the Martin?

A. According to the return of the survey, we were not; but according to the marks on the ground, we were.

Q. You never saw any marks you know were made for the Martin?

A. No, sir.

Q. On any line of it?

A. No, sir.

218 Q. Therefore if you run the Martin just as the surveyor said he run it you would come out at the southwest corner 32 rods further north than where you did come out at least?

A. That would depend upon where we started.

Q. Well, starting where he says.

A. He did — say where he started.

Q. Don't—if he don't say where he started I would like to know how you found out where he started?

A. We don't know where he started.

Q. Didn't you find out enough to satisfy you that he didn't start at all; simply undertook to locate the Martin on his table in his office?

A. Well, that is a theory we might very readily adopt. Having marks on four sides that he knew were there he might very readily close it up without any difficulty.

Q. You ran the eastern line of the Lobdell?

A. Yes, sir.

Q. Did you find any original marks there?

A. No, sir.
Q. You found timber there.
A. Part of the way; some places.
Q. Original timber?
A. I think there were some places. I am not certain whether there was old timber on it, on the line, that would have born-
219 date. There were some on either side that would occasionally have borne date.
Q. You measured it at its official length?
A. Yes, sir.
Q. When you got back to post by pine and started west on what you call the official course, how far were you away from that corner that you had previously made at the end of the official length of the Lobdell?
A. We did not make any corners.
Q. You had something to indicate where you stopped?
A. We had a mark there for ourselves to come back to.
Q. How far were you away from it?
A. At what point do you mean?
Q. When you ran west from the post by the pine?
A. I think our chain measure up the mountain was about 34 rods.
Q. On which side of the mountain were you?
A. On the north side.
Q. Then you measured down the mountain 34 rods?
A. No. Measured it—the chainman went down and measured up the mountain.
Q. You went down to the place where you stopped and measured up?
A. Yes, sir.
Q. Where were—on which side of the mountain were you on when you stopped at 34 rods south of your official distance of the Lobdell?
220 A. Why that is where we were—34 rods south.
Q. Which side of the mountain were you on?
A. On the north side of the mountain.
Q. You were still on the north side of the mountain?
A. Yes, sir; when we stopped at the official distance we were down in the flat just at the beginning of the rise in the hill.
Q. Will you read from that description and tell the jury what the length of the line of the Lobdell called for in the patent or deed is.
A. Along the east line is 320 rods of the Lobdell, lying directly west of the Richard Martin, beginning at a black oak; thence by the line of Joshua Bean south 320 perches to a post; thence by vacant land south 87 degrees east 221 perches to a post.
Q. That calls for a line north and south 320 rods long?
A. Yes, sir.
Q. Where did you make the southeast corner of the Lobdell according to your line?
A. Well, it would be about 353 or 354 rods.
Q. It would not correspond with that paper very much, would it?

A. Not in distance.

Q. It would not correspond in quantity, would it?

A. I think not.

Q. Mr. Trescott, is there any difficulty in your locating, taking that patent and going right upon the ground and fixing
221 the lines just exactly as that patent fixes them?

A. There would be none, measuring at its official courses and distances, except the error in one of its lines. We think there is an error in one of its lines of three degrees; in its western line.

Q. Would you correct that error?

A. We might correct it, or it might be left as it is, bringing the other tract up to it.

Q. There would be no trouble in going there and locating the Lobdell according to that patent?

A. Only locating this course to its course here (pointing) the south line would be longer.

Q. There is a variation of three degrees?

A. Yes, sir.

Q. That variation in the east line of the Lobdell?

A. I think so.

Q. I see the line of the Joshua Bean calls for a line exactly like the west line of the Lobdell, south three degrees east.

A. That is east; south three west; this is not south three west.

Q. What is it?

A. It is south; there is where the difference is; they call for each other; then there is three degrees difference in the top of their lines, starting at the same common corner; at the northern end we encounter the same difficulty either in the shape of that line or the length of that south line.

222 Q. Because you fix the Martin 32 rods longer north and south you run out and fix the southeast corner of the Lobdell 34 rods longer than its call on its return and in the patent?

A. We made them a common corner, as their official distance showed.

Q. You don't answer my question exactly. Because you find the eastern line of the Martin 32 rods longer than the official return of the survey you make the southeast corner of the Lobdell 34 rods further south than the official survey and the patents call for, do you not?

A. The difference between 32 and 34 might have been in chaining.

Q. Is there any difficulty in answering my question?

A. We make it 34 rods, all our chains measure.

Q. Longer?

A. Longer than the official distance; the chain was not very accurately carried.

Q. Does the Lobdell call for the Martin?

A. No, sir.

Q. Do you know of any principle upon which you can extend the lines of the Lobdell beyond their official calls at that point?

A. Only when there are sufficient monuments to control.

Q. What do you call monuments?

223 A. It is a marked line or lines that we run upon the ground at the time or before the time the lines of adjoining lands of older surveys or even those made about the same time.

Q. Then the principle upon which you are acting is that you found a post corner and the marks on the west of the Martin?

A. On the south of the Martin.

Q. On the West and Martin, I said.

A. Yes, sir; the southern line of the Martin has something to do with locating.

Q. Mr. Trescott, don't you know, as a surveyor, that you have no right to extend the lines of the Lobdell by reason of any work you found on either the West or the Martin?

A. We might not have had, if we had no monuments elsewhere.

Q. Can you answer that question as I put it to you? Don't you know, as a surveyor, that you have no right to extend the lines of the Lobdell because you find marks upon the West and Martin that would carry you away from it?

A. Not for those marks alone; we probably would have no right to extend its official distance.

Q. You said you found the northern boundary of the Branham by that line on the south side of the West and the south side of the Martin.

224 A. I think that would be its proper place.

Q. You have stated that?

A. Yes, sir.

Q. You also stated that you knew of no principle by which you can change the course of the north line of the Branham at that corner that was spoken of—the pine corner 150 rods west of the post by the pine; am I not correct in my understanding of your testimony?

A. I think so.

Q. Did not you in continuing that line disregard the length of the line called for by the Lobdell and didn't you disregard the call in the Branham for the Lobdell?

A. No, sir; we did not disregard it.

Q. Did not you fix the line of the Branham where it intersects or purports to join the Lobdell 34 rods further south than the official line of the Lobdell goes?

A. Yes, sir; than the official goes.

Q. Did you find anything on the north side of the Branham that prevented it from answering its call?

A. I found nothing original on the south line of the Branham after we left the post by the pine.

Q. I ask you, then, if you found anything on the Branham that prevented it from answering its call.

225 A. I answer it that I found no marked line—nothing original.

Q. Did you find anything on the north side of the Branham that prevented it from answering its calls on the north.

A. The Richard Martin being located in there at its call that far.

Q. It don't call for the Martin at all?

A. The Martin being located there first we could not disregard the Martin.

Q. No matter whether it interferes with the Martin or not, it does with the survey you found there?

A. Yes, sir.

Q. Calls for that on the north?

A. Yes, sir.

Q. Did you find anything on the ground there to prevent the Martin from answering its call for the Lobdell?

A. You mean the Branham?

Q. The Branham.

A. Not at that point; I did not.

Q. Do you hold, as a surveyor, that you would have no right to run the Branham up to the Lobdell to answer its call in the absence of marks upon the north side of the Branham.

A. Well, I think we could not go to it.

Q. Why couldn't you go to it?

A. By its official course from the post by pine.

226 Q. You could not disregard the official course?

A. I think not.

Q. Don't you know that it is the law that a survey comes to its calls even though you have to disregard the course?

A. When you have no monuments.

Q. How many would have to be disregarded?

A. A great many; it would change the whole block.

Q. Did you run the length of the northern line to ascertain whether it was an original line?

A. I think I did.

Q. That northern line come to what date?

A. 1793.

Q. You explained it sufficiently for that purpose?

A. Yes, sir; I think so.

Q. Is there any difficulty, then, in starting from that northern line at the corners called for in the official surveys and running out each one of those surveys according to the return?

A. There would be no difficulty in doing it, only you would not conform to the official papers as a block.

Q. What block are you talking about?

A. The whole Brush Valley block.

Q. What is that?

A. Composed of those 11 tracts, and probably the Martin.

227 Q. You would not treat the Martin as one?

A. It is not one of the batch of warrants, but undoubtedly one of the same batch of surveys.

Q. Let me ask you what is a block.

A. It generally means a number of surveys or warrants located upon the survey.

Q. It means more than that, does it not?

A It means a batch of surveys.

Q. Isn't your understanding of a block of surveys to consist of a

batch of surveys belonging to one man and located by one surveyor at the same time and in one body?

A. I do not conceive that the warrants must necessarily belong to one man or even all be one batch. I might give my reason for it. I have found warrants of different dates belonging to different owners all included in the same outline or survey, and all returned as a block, but there was 20 years difference in the dates of the warrants.

Q. That is your idea of a block?

A. They may be located by one continuous survey upon a block of ground.

Q. How on earth could they be located as a block by one exterior line and some not returned for 20 years afterwards?

A. The warrants did not call for each other, and the return of the surveys did, and no other work done upon the ground.

228 The said counsel for the said defendant, further to maintain the issue on the part of the defendant, also called Henry S. Boyer, George W. West, A. J. Guffy, James Caldwell, T. W. Moore, and T. F. Brown, experienced surveyors, who, being duly sworn according to law, testified to the same fact; also read the testimony of Abram Shipman and Erastus P. Dean, deceased surveyors, taken from the former trials to the same effect.

A. J. GUFFEY, one of the said surveyors, testified, *inter alia*, in relation to the monuments on the line between the Brush valley and LE FEVRE blocks of land beginning at the post by the pine as follows:

Q. Give us the distances of these trees.

A. The distance to the pine tree from the post by the pine is 34.1 perches. We commenced at the post by the pine; I ought to say the pine witness on the ground with axe marks; that I saw no post. A little pile of stones at the side of Catawissa turnpike, east side of pike, and the stump stood on the bank had been opened and blown down. We could see axe marks on that tree and also some of the notches for that purpose very well. At 179.7 perches north of us we found a mark that counted 68 years; at 202 perches, about
229 4.2 south of it, I found a line tree about 55 years of age, same as the Sharpless.

Q. What distance?

A. 202 perches from the post by the pine; at 307 a stone corner; 315, a stone corner made for the Martin Lobdell. We passed on along the southern boundary of the Lobdell north 83½ degrees east; at 41 perches, white pine counting 54 and 56 years, and two north of it.

Q. At what distance is that from the Lobdell corner?

A. That is 41 perches from the southwest corner of the Martin; at 140 perches from the southwest corner of the Martin, nearly on the Lobdell, we found a chestnut that we opened on the west side, a chestnut oak line tree; we opened it on the west side and counted 86 years. * * *

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Q. What does the northwest corner of the Ebenezer Branham call for?

A. A chestnut, I believe.

Q. You found a chestnut stump in its proper position with chestnut sprouts around it?

A. Yes, sir; we then turned south 73¼ degrees west, at 109.6 perches, by the post by a pine.

Q. How high above the ground was it scarred in the same way it was there?

A. Twenty feet it was scarred, the whole tree on that side; it was scarred for 20 feet.

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230 Q. When were you first at the Rockefeller maple sprouts?

A. In 1877.

Q. Describe what you found there.

A. We found a stone pile that was represented as the place where David Rockefeller fixed for his maple, southwest of that point about $7\frac{5}{10}$ rods, chestnut oak witness spoken of by David Rockefeller; it had been opened on the southeast side and opened toward this stone pile, said to be opened by David Rockefeller; I didn't see him do it, but the opening was in the tree; tree was standing when I first saw it there; it was a bent tree—chestnut oak—bent rather towards the northwest, scarred from the limbs to the ground; on the southeast side of the tree it was scarred as though a tree had fallen on it and slid down.

Q. Did you discover any marks of a surveyor upon it?

A. We couldn't find anything of an axe mark or any indications of any axe marks.

Q. Who were with you?

A. Mr. Clement was with me the first time I was there; I
231 don't remember the chain. Deed further produced. A. K. White, surveyor, who, in testifying as to the measurements on the northern line of the survey, in the name of Ebenezer Branham, and the northern line of the Richard Martin, said again: "A. Then we ran south, I think, 78 perches with the course of Roaring creek; at 286 perches, 36 perches from the official distance, we came to a stone corner, represented on that diagram as the southeast corner of the Richard Martin and the southwest corner of the Francis West; there was a notched tree which was very much mutilated, so that it was impossible to get the date; it may have been chopped; looked to be by the surveys."

Q. What kind of tree?

A. Yellow pine.

Q. What point is that designated by the surveyors?

A. Post by a pine; we also found marks between the northwest corner of the Francis West and that point; we counted back; I couldn't make them count back to the survey of 1793 or 1794; I couldn't tell exactly; from that point we run east along the southern

boundary of Francis West; I think the course was north 73° east, with variation; we found the line of 1793 along the southern boundary of the West, at 110 perches to a stone corner; we went east, however, along the southern boundary of the West, and about three perches we found a stone corner. We were unable to find any marks that we could count that distance. We then came
232 east and was unable to find any marks along the southern line of the Houston. We then went back to the southwest corner of the John Houston and ran north; found plenty of timber there but found no marks. We then went back to the post by a pine, the southwest corner of the Richard Martin; went north of the official course, with variation, and at $34\frac{6}{10}$ perches we cut a yellow pine; ran westward along the southern boundary of the Martin; I took a block from that yellow pine; I couldn't count; I had trouble in counting eighty-five years, but I took a block from that tree and found that it counted to the survey of 1883—eighty-six years. At $39\frac{6}{10}$ perches we blocked a chestnut oak of an original line; I think I took that block from the tree; we counted 64 perches to a fallen tree, blocked evidently by surveys, south 150 perches. We came to a road at 150 perches; we came to a road at 1½ north, a tree blazed on four sides; I am not clear what that tree was; it may have been for a corner and blazed; it is pretty hard for you to determine.

Q. How many trees did you say you found on the Martin?

A. I found three.

Q. Three that had not been previously discovered?

A. No, sir; I think two of them had not.

Q. All of which bore date of the original survey, counting 1793 and 1794?

A. Yes, sir.

Q. Does that count the same date as that on the north line?
233 A. Yes, sir; they were evidently made by the same man. When we began at the southwest corner of the Martin we went close to a yellow pine. At $9\frac{6}{10}$ perches I came close to the chestnut oak. I concluded there was a mark in the chestnut oak. We cut it to find the original marks. It was Mr. Mitchell. It was an axe mark. There was some dispute about it and concluded to come back to the pine, although we had examined it. It was impossible to see anything that looked like a mark on the outside. I cut in just at the height I had cut in on the north line and came to an axe mark I have spoken of. The surface of the yellow pine has determined that—almost impossible to show on the north of the yellow pine—the Zimmerman indications on the same old marked tree, if marked in 1793.

Q. It is difficult by most experienced surveyors to discover?

A. Yes, sir.

Q. As I understand, you passed this where no external indications were seen by any of you, and you afterwards went back and struck in the north line and found a younger mark?

A. Yes, sir; $34\frac{6}{10}$ perches. We went to it; the other was 39.

Q. There were other trees you discovered?

A. 150 rods; about 1½ south of it I was running.

234 Q. Then you found two at that time, counting to the same dates, as in the northern tier?

A. Yes, sir.

Q. You found one counted to date 1794?

A. Yes, sir; counted 85 years.

Q. That is, you discovered marks that would bear date above the Martin and Branham surveys?

A. Yes, sir; they would have been made for them.

Q. The Branham?

A. Yes, sir; having been made in the fall of 1794 would have bore growth of that year, and the count would indicate its growth in that block in a tree—that the Branham was made in the fall of 1794.

Q. Would it not count one year younger than the 1793 survey?

A. Yes, sir.

Q. The pitch pine tree that has been spoken of, of the same fall, is 64.3 perches west from the post by a pine corner, was it not?

A. Yes, sir; it had been chopped and fell down from counting surveys.

Q. Again, is there any difficulty in seeing it is not the southern line of the Richard Martin survey?

A. I cannot see that there could be.

Q. About the location of the Martin with the monuments, is there any difficulty in fixing beyond doubt the southwestern corner of the Richard Martin survey by monuments?

235 A. No, sir; the southeast corner and the northwestern corner of the Martin must fix it; the southwest corner by running the official course until they intersect.

Q. Then, though no monuments had been found on the south lines of the Richard Martin to correspond to the date of the survey and in the official course of the southern line as found by you, would the northern line upon the ground, as you run the line and its western corner well established, would there be any difficulty in any surveyor fixing its southwestern corner?

A. I cannot see that there is; the lines must come together there, extending from the northwest corner and the southeast corner, until they intersect.

Q. Until its intersection between the lines of the Lobdell and Mary Ruston?

A. Yes, sir.

Q. The northeast corner of the Branham calls for a chestnut?

A. It calls for a small chestnut.

Q. Is there any other survey which corners at that point, except that you know of?

A. The original papers show; I don't know of any except a younger survey, Peter Boughner, in 1852.

Q. Is that or not an original monument, and does it not show that the survey in 1794 was on this?

A. Well, it looks so.

236 Q. Therefore the original return of the Branham shows that William Gray or his assistant were on the northern line of that block in 1794?

A. Yes, sir.

Q. The post by the pine corner of the Francis West and Richard Martin, as called for and adopted by that survey, also would take the effect of the adoption by the deputy surveyor and mark the tree as the older survey as adopted?

A. I think it is the same as if made for it by adoption of the corner.

Q. So that the northern line of the Branham to the return shows monuments made by the surveyor in 1793 and the one adopted in 1794. Did you run between these points upon the lines?

A. Which have you reference to now; between the north corner of the chestnut and the maple by the pine, 109 perches?

Q. Yes, sir. Did you find that course there to correspond with the course returned by the deputy?

A. Yes, sir.

Q. The trees you found were in course as returned also?

A. Yes, sir; exactly in course with the variation we fixed; we got the variation of the north line and then run the exact variation.

237 The counsel for the defendant also called George W. West, A. J. Guffy, Henry S. Boyer, R. F. Brown, T. W. Moore, James Caldwell, surveyors, who were severally sworn according to law and testified to the same effect, and read in evidence the testimony of Abram Shipman, William W. McWilliams, and Erastus P. Dean, surveyors, who had testified to the same effect on former trials, they having died prior to this trial.

H. S. Boyer, speaking of these trees found on the north line of the Ebenezer Branham and south line of the Martin, says:

Q. When you was there in 1876 what did you find on the south of the Richard Martin?

A. Nothing but the pitch pine line tree at 64.5 or 65.5, at the post by the pine—we found nothing but the pitch pine line tree.

Q. In may, 1876?

A. It was in June.

Q. You and Judge Shipman were the only surveyors?

A. Yes, sir.

Q. What did that pitch pine line tree count?

A. To 1793.

Q. The same as the trees on the north line?

A. Yes, sir; the same as the trees on the north line.

Q. What distance was that from the post by the pine?

A. 64.5 or 65 rods.

Q. When was you along there again since discovering the old trees on the south of the Martin?

238 A. In Sept., 1879.

Q. Who was with you?

A. I was with Mr. Mitchell and Mr. White.

Q. What tree was discovered there and counted to date?

A. We discovered a pine at $34\frac{6}{10}$ rods west from the post by a pine; at $39\frac{4}{10}$ rods a chestnut oak counted up to 1793.

Q. Any others?

A. Not at that time, except at 150 rods we found a pitch pine line tree about two rods north.

Q. Was that the time Mr. Mitchell and Mr. White was with you—that in addition to the pitch pine line tree you discovered with Judge Shipman three more trees?

A. Yes, sir.

Q. What did they count to?

A. The pitch pine and chestnut oak we discovered in 1879 counted to 1793, and the pitch pine at 150 rods counted at 1794, counted 85 years—one year younger—two rods to the north lines.

Q. The other trees that you mentioned as having been found by you, and what is called the pitch pine, are they standing and what position in regard to the lines?

A. They are marked right on the line, as even as if they had been upon the line as these trees were.

Q. Did you at any time discover any other trees south of the Martin?

A. Yes, sir; that same fall; I think in November, about the 12th Nov., 1879, in company with Mr. West and Mr. Guffy, we
239 found another pitch pine that was down; that we counted up and its growth was 16 years and broke down; we concluded that it was an original tree; the tree must have been down five or six years, which, if it was the same, would make it an original tree, 1793.

Q. Just tell how you counted that; explain how you can tell certainly how long it grew after it had been blocked.

A. It counted 55 years to the block, and — grew 17 years afterwards, and that would fix it 55 years in 17. Hold on, it is a mistake. The pine at 135 counted 64. I will read you from my notes; that is the way I reckon it: "Pine down at $135\frac{4}{10}$ counted 64 block, 17 making it 1881, and counting to the original it would have to be 86 years." Now, it appeared to be down four or five years. The tree was down and was already counted 81 and had been counted afterwards.

Q. It was first blocked?

A. Yes, sir.

Q. What year was it you discovered it there?

A. 1878, 1879, G. W. West says in his testimony as to the post by the pine corner called for by Martin West and Branham.

Q. When were you first at the post by the pine, the southwest corner of the Francis West and the southeast corner of the Richard Martin?

A. In 1852.

Q. Was the pine tree a witness to the post corner standing there?

240 A. It was, and had been blocked a short time before I went there.

Q. What did the pine tree count to?

A. It counted to the date of the Francis West survey.

Q. There is, then, as I understand you, no doubt about the location of the post by the pine corner?

A. I have none.

The defendant's counsel, further to maintain the issue upon his part, read in evidence the testimony of John Fisher, taken upon the former trial, involving the same question of dispute, in which he testified that he was familiar with the Brush Valley block and the Lefevre block of lands, and that he owned at one time the undivided one-half of eight tracts of the Brush Valley block, and had resided near the lands from 1812 to 1850, who testified, *inter alia*, as follows:

Q. Was you ever with any parties who ran any lines on this block of lands in the Lafevre block?

A. Yes, sir; I was with Henry Donnel in 1814 or 1815; I am not positive which.

Q. Who comprised that party of surveyors?

A. I don't remember—John Mowrey, Wm. Netherland; Donnel, I think, was county surveyor; I carried chain and the axe—sometimes the chain and sometimes the axe; Netherland carried
241 the chain and took down notes for Donnel. They started at a corner near Roaring creek and ran down west about 30 rods and cornered; then ran across the point of Little Mountain upon the point of Little Mountain and cornered again; this was a corner; then we ran east, I think a little south, to a corner of the Daniel Reese; then from there we ran on several tracts to a rock oak, where we came to a corner, and ran the division line between the Daniel Reese and the Charlotte Ruston, and ran across near the lead of the water of the second gap run to a small swamp, corner of this, on a line that was run there some years before. * * * That cross-line was between the Thomas Billington and Reynolds, I think, near the survey; then from that corner we ran west until we crossed the turnpike about 4 or 5 rods south of the culvert, in stream on the mountain, where it crossed the pike. The stream was there near the foot of the ridge. We ran something like five rods south, then we ran on down, crossed the old Reading road, and came to a large pond. * * *

Q. When you ran the lines between the Billington and Reynolds, what did you find at the western—the southwest corner of the Billington?

A. We found the stone corner and post that was near a small swamp at the head of the second gap run on Big Mountain.

Q. How close was it to that swamp?

A. The swamp was water all through, but took it from
242 the center; from the edge of the swamp it was some four or five—six, I think likely; north of the swamp this line was cornered.

Q. Do you know where the maple sprouts that was fixed by Rockefeller was located?

A. Yes, sir; saw them once.

Q. How far south of them was this corner that Mr. Donnel ran to?

A. So far as I can judge, somewhere between 40 rods and 60 rods; maybe 70.

Q. Was you well acquainted with the land in that country?

A. Yes, sir; there is no man living that knows more about them. I travelled over every foot of them dozens of times; there is not an acre of ground but what I have been on dozens of times. I used to hunt a great deal, and this corner is where the swamps used to be in my course to hunt. The deer used to come to the edge of the swamp. I always came right along past this corner; dozens of times I have passed it. The last time I was there there was nothing there; it is full of maple sprouts all around it. I saw this heap of stones there often.

Q. How far did Mr. Donnel run along the southern line of the Brush Valley, the line between the Lafevre block and Brush Valley?

A. Donnel run east of it, I think, about three times and cornered between the Old Bear, above the Catawissa path again.

243 Q. Was you along with Mr. Clement's surveyors when they ran the lines upon the ground?

A. Yes, sir.

Q. When was that?

A. I have been along with him several times. The first time was about 4 or 5 years ago; this day they surveyed; they wanted me to go up and show them, as near as I could, where the corner was near the swamp. I went to show—or rather we ran along there past where this corner was fixed in 1814.

Further to maintain the issue on the part of the defendant, the defendant's surveyors hereinbefore named, *inter alia*, testified that the corner at the swamp pointed out by Fisher was in the line run westward by them by the post by the pine corner, the southeast corner of the Richard Martin and the northern line of the Ebenezer Branham, and that in running this line and surveying these lands we discovered several trees which were blocked and which counted back to 1814 or 1815, the date fixed by Fisher for the Donnel survey.

244 The plaintiff's counsel in rebuttal, to support the issue on the part of the plaintiff called W. A. EDEBURN, who, being duly sworn, *inter alia*, testified as follows:

Q. Mr. Edeburn, state after you heard the testimony of Mr. Trescott and some others in relation to the gum and witness, a gum line tree, you in company with others went back to this body of land for the purpose of making this examination.

A. Yes, sir.

Q. Who were with you and went in company with you?

A. Mr. Mitchell and Robert McAdams, who went on the ground on the 7th of this month and went to the corner, as has been testified to, where this maple stood and made an examination of the tree there where we had seen on a former survey.

Q. You mean to say you had been to this place?

A. Yes, sir; we had been there when we made the former survey;

we had been on the ground and examined these trees and around this point and this corner; we saw the gum tree that had been testified to; I understood where they were located and I remembered distinctly about seeing the trees and the appearance of it on the former survey; we made the location of the different trees around this corner—this maple; the gum tree that had been testified to as the witness I remember on the former survey of seeing this scratch, a long ragged scratch; I took it to be on this side of the gum, but had no idea that it was an axe mark, or we would have cut out to see if there was an axe mark, although we could not count it if we had;

245 we made a plan showing Clement's painted corner and giving the location of the trees around that corner; I went to this maple and found the leaves gathered up and blown around it probably five or six inches high; I took a stick and scratched the leaves off the roots and found it standing on a flat stone about two feet, probably, or twenty inches wide; I did not measure it; that is my recollection of it; the roots run around on all sides down into the ground after passing over this stone; I could not see any evidence of any stump, as I heard in the testimony.

Q. There was no stump?

A. No, sir; no stump; that was all; the maple was within probably 50 or 100 feet; I don't remember of any other maple just in that neighborhood; there are maples around in the swamp in other places, but not in the neighborhood of this maple; this gum tree that has been testified to as a witness to the corner we cut down and brought home.

Q. Is that the gum tree? (Shown witness.)

A. Yes; that is the way it stood; this (pointing) part was to the east; my recollection was that there was a long scratch, ragged scratch, or bruise from this height down to there; that was before it was disturbed or cut on; we found it in this position when we got on the ground, on the 7th of this month, with the exception of some few chips we cut out to see if there was any indication of growths that they had counted; they had cut out here (pointing) and this up here (pointing).

Q. Were there any axe marks on that tree?

A. No old, original axe marks; nothing of an old character; nothing but — was done within two years.

Q. What they cut into was into this old injury which caused this decay up through here?

246 A. Yes, sir—that is, the decay extending from the roots up to this point. See the black line there from the end of this decay to the roots.

Q. That, you say, continued up here (pointing), and they got it in the block that was taken out?

A. I suppose they must have gotten it, because there was a continuation of this bruise up here.

Q. Mr. Edeburn, that was a living tree when you cut it down on the 7th of December, was it not?

A. Yes, sir.

Q. State whether you cut that off (block shown witness) or had it cut off from that block.

A. It was; it was taken off that block. It was in my office, and it was taken off there.

Q. For the purpose of ascertaining whether it could be counted?

A. Yes, sir; that was the object—to get into clear wood.

Q. I understand you to say there was no axe mark there?

A. No old axe mark.

Q. In the second place, you may state whether, if there had been an axe mark, any living man could count that tree.

A. No, sir; it could not be counted.

Q. Mr. Edeburn, what was that? (Another tree shown witness.)

A. That was the gum line tree testified to, standing west of this corner, about seven rods.

Q. Can you tell the jury where they examined it?

A. From the testimony they got out these lines both east and west.

Q. How much solid wood is there in that shell?

247 A. Well, on this side (describing) there is about two inches. On the other side there did not seem to be more than three-fourths of an inch.

Q. Those openings are old openings?

A. Yes, sir; those are openings as we found them when we went on the ground, just as we found on the ground.

Q. If there had been an axe on this side (here) state whether it would have left a scar on the one side there?

A. Yes, sir; it would have if it would not have rotted away.

Q. That, you say, was the pine tree that has been spoken of by some of the gentlemen here?

A. Yes, sir.

Q. Is there any wood there that can be counted?

A. No, sir; not any.

Q. Did you open that when you went on the ground surveying the first survey?

A. The first survey; yes, sir; we examined all the trees in that neighborhood.

Q. That is, you examined that tree before these parties that have alleged they found it?

A. Yes, sir.

Q. Was there any axe mark on that?

A. No, sir; there was a bruise or mark or bruise; something that would indicate something like a scratch; no clean-cut axe mark like usually on a gum or any other tree—that is, the end of this bark that you can see it on.

Q. We have the maple and the gum witness, and we have the sight tree and line tree. Now, will you tell the jury whether you have made or caused to be made a map giving these locations of the trees on the ground?

248 A. Yes, sir; I have; this map was in my office.

Q. That map was made from actual measurements?

A. Yes, sir.

Q. Actual measurements on the ground?

A. Yes, sir.

Q. State what the course of the line from the gum or from this maple to that line tree would be as you ascertained from actual measurements the bearing from that maple as it would be out to this hollow gum.

A. Would be south 88 degrees 10 minutes west.

Q. What is the line of the Brush Valley lands?

A. The course of the lines of the Brush Valley tract is north 86 degrees west.

Q. What is the variation?

A. 5 degrees 50 minutes.

Q. What would be the effect on that map to protract your line so as to show how it would run so as to compare with the official line with the southern line of the Brush Valley land?

A. I have marked the line on this map.

Q. If those trees were marked on and could be counted back to the date of the survey are there any lines on any of the official papers that you have any knowledge of?

A. No, sir; there are not.

Q. Mr. Edeburn, state whether you went to what they call the chestnut oak, south side of the Lobdell, 140 rods west of its southern corner on their line.

A. I did; yes, sir; on the former survey; not on this survey.

Q. What examination did you make of that tree; what did you find?

249 A. I found a tree lying on the ground.

Q. What trees are near to this maple tree as you found on the ground there?

A. We found a pine 16 inches in diameter, and another gum there about that same dimension; another pine about the same size, and another gum 31 inches in diameter; white oak 17 inches in diameter, a pine 19 inches in diameter, a pine 20 inches in diameter, all within a radius of 2 rods.

Q. There is another large gum nearer than the gum which they claim to be a witness, is there not?

A. Yes, sir; one nearer the maple—the one within 9 feet nearer the stone corner; that is that (pointing); that gum is 9 feet east of the stone corner.

Q. And none of these trees marked, although there are pines there 16 inches in diameter; that would indicate them to be how old—150?

A. Well, I suppose from 120 to 150; some sizes might be older than that.

Q. A line running from one of their marks to the other and run off east here (pointing) would run through this body of surveys out this way (pointing.)?

A. Yes, sir; it would cross the line, I think.

Q. And run west to the line out here, to the Sarah Lane and Jesse Evans?

A. Yes, sir; it would.

Q. Mr. Edeburn, if those trees were marked and could be counted back to the date of the survey, are there any lines on any of the official papers that you have knowledge of?

A. No, sir; they are not.

250 Q. Mr. Edeburn, did you examine the chestnut oak on the south side of the Lobdell, as claimed by them, on what they claim to be their line, 140 rods west of the southeast corner?

A. I did; yes, sir.

Q. State what examination you made there and what you found.

A. That was in January, 1883. The first time we were on the ground we found this tree fallen; it had been notched into and had fallen down or blown down after the notches had been made—the blocks had been made. The leaves were still on the tree. We took a block from the west side and a small block from the east side. We took a good-sized block from the west side and a small block from the east side.

Q. Is that the block? (Block shown witness.)

A. Yes, sir, this is the block from the west side and that (pointing) is the block from the east side.

Q. Did you examine for axe marks on the east side of the tree?

A. Yes, sir.

Q. Were there any there?

A. No, sir.

Q. That is the tree Mr. Guffy says he counted 86 years. Did you count the tree on the west side?

A. I think I did. I counted the block of where there were no axe marks on it. It counts so far as the block extends—about 80 years—until we get into solid, hard wood, where there are no indications of shakyness or rottenness.

Q. The only mark, then, on the tree was this (pointing)?

A. That is the mark we got.

251 Q. Below you say there is hard, solid wood?

A. Yes, sir.

Q. You say that counts but 80 years?

A. Yes, sir; about 80 years.

Q. That would be too young for the line?

A. Too young for the line.

Q. What was the conclusion you came to from your examination as to whether it was an axe mark or not?

A. That it was not an axe mark.

252 Counsel for plaintiff also offered in evidence testimony of GEORGE STRAUCH, taken on a former trial between Ira T. Clement and the Northumberland Coal Company, as follows:

Q. Mr. Strauch, state whether you have counted that block.

A. I have just counted it.

Q. Carefully?

A. Counted it carefully; went over it twice to be certain I was correct.

Q. Did you use a magnifying glass?

A. I did.

Q. Had you any difficulty in counting it?
A. None whatever. I consider it very easy counted.
C. What does it count?
A. It counts to the fall of 1797 or spring of 1798. In the fall of 1799 it counts 82 years.
Q. Does it count any more than that?
A. It does not, sir.

Also the testimony of Robert A. Ammerman, at the same trial, to the same effect.

Also called R. L. McCULLY, who, *inter alia*, testified as follows:

Q. Mr. McCully, I think you were along when that block was taken from the chestnut oak 140 perches west of the southeast corner of the Lobdell, were you not?
A. Yes, sir.
Q. State whether that (pointing) is the block.
A. Yes, sir.
253 Q. State what was the condition of the tree when you saw it first.
A. It had fallen; broken off where it had been blocked.
Q. Which side had it been blocked?
A. On the west side.
Q. Was the tree living or dead?
A. The leaves were still on the tree.
Q. What time of the year was this?
A. In January, 19th.
Q. Then it would not show its leaves of that year?
A. No, sir.
Q. State whether you examined carefully the outside to see if you could discover any marks on the east.
A. Yes; I did.
Q. Could you discover any?
A. No, sir.
Q. State whether you took a block from the east side.
A. Yes, sir; I did.
Q. Is that the block you took from it?
A. Yes, sir.
Q. Had it ever been marked on the east?
A. Not that I could see.
Q. You took the block (pointing) from the west. Was that under or over the old blocking?
A. Why, immediately above it.
Q. The mark that is in that block there was the remains of the old block that had been cut out, had it?
A. Yes, sir.
254 Q. State whether it is an axe mark.
A. No, sir; it is not an axe mark.
Q. The mark is the result of an injury, is it not?
A. Yes, sir; it was hurt by something striking down on it.
Q. Was that tree ever marked as a line tree?

A. I think not; I could not say. No indications of an axe on that beyond there (pointing).

Q. Have you examined the gums that are here?

A. Yes, sir.

Q. That one, claimed to be a witness to the corner, and the other, claimed to be a line tree?

A. Yes, sir.

Q. Were you at the place where these trees have been claimed to have been on the ground?

A. We were there in April.

Q. What year?

A. 1882.

Q. State whether you made an examination around in that neighborhood, in that vicinity, for marks.

A. Yes, sir; we did.

Q. State whether you saw these trees.

A. Yes, sir.

Q. Do you remember of examining this gum that they claim to be a witness?

A. Yes, sir; I recollect of looking at that tree.

Q. Tell the jury what you observed when you saw it.

A. Why, at that time I decided that it was hurt—hurt by another tree falling against it—falling alongside of it.

255 Q. State whether it had been blocked.

A. It had been cut into.

Q. Cut into that lower place?

A. Yes, sir.

Q. That is an old cut, isn't it?

A. Yes, sir.

Q. It had been cut into clear into the decayed part when you saw it?

A. Yes, sir; it was cut into like all the heart.

Q. Did you see anything like the indications of an axe mark upon that tree?

A. No, sir; I did not.

Q. Nothing that looked like marks for a corner?

A. No, sir; nor a witness either.

Q. Mr. McCully, have you examined these gums to see whether they could be counted?

A. Well, I could not count them, or can't count them; I never got hold of a gum that I could count.

Q. You have told us that you have had a large experience in surveying.

A. Yes, sir.

Q. State whether you ever saw a gum that you could count.

A. No, sir.

Q. Did anybody else?

A. I would not like to say that.

Q. State whether, from your examination, it is at all possible for any person to count either of those gums to any reasonable certainty.

256 A. Well, I don't think it is.

Plaintiff's counsel also called Robert McAdams in rebuttal, who testified that he was axeman along with the surveyors, and testified to the same effect.

Plaintiff's counsel also called J. H. McRoberts, a resident of Pittsburgh, a civil engineer and surveyor, who testified to the same effect, and on cross-examination testified as follows:

Q. State whether, from your knowledge and experience as a surveyor, or in the examination of that kind of wood, a gum can be counted with sufficient accuracy to establish the age of a line?

A. That is a direct question. Under the favorable circumstances that I have met a gum tree I have always left it with a doubt as to whether I got a certainty out of it.

Q. Again: You say you have counted gums and formed an opinion as to whether they were corners and left that with little doubt?

A. Yes, sir; you will observe this: If I was interested in a survey the interest might center in the gum tree, and then if I blocked it I want to count up to as near the date of my papers as can be; because if it does it will be corroborated; and, again: I am running a line off. It may involve the going over of miles of survey, and therefore it might have an influence on my opinion. If my first count coincides with my papers I might take it.

Q. Do you swear that a hickory can't be counted under any circumstances?

257 A. I can't swear, but do swear I may have a doubt.

Q. That (pointing) is not in a proper condition to count?

A. No, sir; it looks decayed and old.

Plaintiff's counsel recalled A. B. Cochran, who testified to the same effect as to the inability to count the gums and the tree at 140 perches west from the post by pine.

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The plaintiff also called W. P. Mitchell in rebuttal, who testified *inter alia* as follows:

Q. You were on this line for the first time in 1878, I believe?

A. 1879.

Q. At that time did you examine the pine tree 150 perches west of the post by the pine?

A. I saw that pine, but I didn't examine it very carefully.

Q. When did you next see it?

A. I saw it next in December or January—December, 1881, or January, 1882.

Q. Did you examine it carefully at that time?

A. I did; I made a careful examination of it.

Q. State how you found it marked at that time.

A. I found it marked with 3 notches and a long blaze—the blaze I had previously seen, and I found, also, marks of a younger survey made about 1830, and found a scar on the tree. That was not an accident; it was older than any axe mark I could see on the tree.

Q. Did you block it at that time—1881?

A. I did.

Q. Is that block in court here?

A. That block is here.

259 Q. State whether the marks of the corner notches appear older than the blazes upon the tree.

A. From an examination of the tree as it appears now my opinion is that there was 3 notches made on that tree, and that afterwards there was a long blaze made—older notches. My reason for that is, when you make a new blaze on a tree the middle part of the blaze must always be deeper than the top or bottom. The notches at the top or bottom are plain to be seen. The middle notch is almost entirely blazed away.

Q. Will you take that block and explain to the jury and let them see the notches there? Just point them out to the jury.

A. This is the east side of the tree. There is a notch plain to be seen right in there; there is an old notch there. This was cut away from here (pointing) on this side. You can see that notch extending out both sides, and also that one. This notch—you can see but a trace of it, showing the blaze made right over and blazed a little notch entirely out; blazed right over it, and that is the scar. * * *

Q. Do they ever make reference to a tree with four blazes and two notches under the blazes?

A. I never saw one.

260 Q. The fact that the notches have been blazed out is evidence of the abandonment of the line tree?

A. It looks so to me. That is the way a surveyor now would destroy a corner he had previously made, afterwards blazing over the marks and destroying the notches.

Q. Can you count the old marks in it with any certainty?

A. I have tried to count them; they count 86 to 88; maybe 85, 86, 87, or 88 years.

Q. They may have been made in 1793, or might have been older?

A. It is very difficult to count; sometimes you can count 87 and sometimes 88. On different sides the growths are different; some wider apart than others.

Q. It is difficult to count, and you can make no certain age out of it?

A. No certain age; I cannot.

Q. In 1881, when you were there, who were with you?

A. Mr. Cochran, Mr. Edeburn, and Mr. McCully; in the fall of 1881 we were together, and Mr. Adams was our axeman.

Q. Then you run to this chestnut oak 140 perches west of the southeast corner of the Lobdell?

A. We did.

261 Q. What did you find in that chestnut oak?

A. We found the chestnut oak cut on the left side. It had fallen down in a westerly direction. It had been cut on the west side. We cut a block out of the west side and examined it carefully for axe marks, and then looked on east side for axe marks. We

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found scars on the tree from which we brought the block, of the eastern side.

Q. Is this the block of the eastern side (block handed to witness) that you took out at that time?

A. That is it.

Q. Was the tree standing at that time?

A. No, sir; fallen down; broken, I think, from blocking.

Q. It had been blocked open on both sides at that time?

A. I think only upon the western side; that is my recollection.

Q. State whether that is the block you took out of it at that time.

A. I did; out of the western side.

Q. Have you counted it?

A. I have.

Q. What did you count it then?

A. That tree—we counted it then, but hadn't it in as good shape as we have it now.

Q. What did it count?

262 A. It counted into the scars that were on the tree 82 years. There were other scars right below that probably of the same date if we had cut into them.

Q. Is that an axe mark in that block there?

A. No, sir.

Q. State whether you saw the block that was taken out of that same west side by Mr. Clement's surveyors.

A. I saw what Mr. Clement's surveyors said they took out of the west side.

Q. Where did you see that?

A. In Senator Peel's and in the court-house.

Q. Did you count the block which Mr. Clement's surveyors took out there, out of that tree?

A. I did.

Q. What did it count?

A. 82 years.

Q. Was it an axe mark?

A. Not that I saw.

Q. Did you inform Mr. Clement or his counsel that it was not an axe mark?

A. I informed his counsel that it was not.

Q. You would not swear to it?

A. I would not swear to it.

Q. Did you see this tree before it was blocked at all?

263 A. I am not certain. I have no doubt I saw the tree. I hunted very carefully along that line on each side of it for axe marks. I have no doubt I saw the tree.

Q. You saw it at that time, this time, December, 1881, and examined it carefully on the east side?

A. I did.

Q. State whether there were any evidences of an axe mark on the east side.

A. There was no more there.

Q. You took that block out for the purpose of observing it?

A. I did.

Q. What was the condition of the tree—was it alive when you were there?

A. The leaves were still on the tree; it had fallen, but the leaves were still green.

Q. It had fallen down, but the leaves were green upon the tree in 1881?

A. Yes, sir.

Q. What age would that block count to that was taken out when you were there in 1882 or 1881, counting 82?

A. 1799.

Q. Supposing the tree didn't grow any after it was blocked in 1879, where would it count to?

A. Count 88 years.

Q. That block they had at Lock Haven was how many
264 years too young, assuming it to be an axe mark counting back to the original date of the Brush Valley surveys?

A. It would be four years too young at that time.

Q. Mr. Mitchell, state whether that block was not counted over by their surveyors upon the other side.

A. It was.

Q. State by whom it was counted.

A. It was counted by Mr. Guffy, Mr. West, and Mr. Boyer in the presence of the court and jury.

Q. Who else—Mr. Ammerman, Strouch, and Lewis, wasn't it?

A. I don't think they counted it—yes, they counted it, too, but I don't think they counted it in the presence of the court and jury; they counted it in the court-room, but I don't remember whether they counted it or not before the jury.

Q. When you were there in 1881 did you make any examination on the line, as claimed by Mr. Clement, on the south of the Billington and Reynolds?

A I did.

Q. Tell the jury what examinations you made there for marks.

A. We examined, I think, all the trees perhaps within four, five, or six rods of the line we were running on each side
265 of the line and south of any corner that was claimed there that we could find there.

Q. Did you find a painted corner at that time?

A. I think not at that point.

Q. The corner claimed by Clement was painted after you were there in 1881 or before you were there in 1881?

A. It was after.

Q. After you were there in 1881?

A. Yes, sir; the corner we found there was about six perches east of where the corner is now. * * *

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Q. When you were there in 1881 did you see that gum tree which they have called here a corner to this maple, which is here also?

A. I did.

Q. Did you examine it?
A. I did.
Q. What did you see upon it?
A. I saw some scars; some hurts on it, I think, had been made probably by trees falling against it; there is one on the same side and the same date as that there now; it is no axe mark at all, although it has the appearance of an axe mark as closely as that; a gum that has bark like that often has that appearance; it has the appearance of an axe mark, although it is not; it is the same date as that and cut in exactly like it.

266 Q. This is a scar shown upon the bark that bears evidence of a bruise at some time or other which produced that scar on the inside and the decay?

A. Yes, sir; and it is almost at right angles with the mark as cut into it.
Q. Were you present when the tree was cut down?
A. I was.
Q. You examined it upon the ground?
A. I did.
Q. Before it was cut down?
A. I did.
Q. State whether the condition of that tree before it was chopped was just as it was when it was cut down.
A. It is, exactly; some little pieces cut out here (pointing), to see whether the growths could be counted, with a knife, that is all.
Q. But it is practically the same, you say, as when you found it there?
A. Yes, sir.
Q. State whether you ever looked at that with the view of ascertaining whether it could be counted.
A. I have.
Q. State whether it can be *be* counted.
A. I think it is impossible to count it.
Q. When you saw it there were there any evidences of any axe marks upon it that were old enough to be original?
A. No, sir.

267 Q. And there is no evidence at all except that scar or bruise which was apparent to a man who understands the business of a surveyor?

A. Yes, sir; a gum with bark on as heavy as that is the axe mark could be seen almost as plainly as that cut now; on a tree with thin bark you couldn't tell it so easily, but you could tell on that.
Q. You could tell the difference on a gum between an axe mark and a bruise?
A. There is no doubt about the difference between an axe mark or a bruise on a gum. I think it is as plain as can be.
Q. You have no difficulty, in your judgment, as to the fact of there being no ancient mark upon it, but evidences of an old bruise?
A. I could see no sign of an axe mark; I thought it was bruised; probably caused by other trees falling against it.

A. Is that the stump of the maple as testified to by Mr. Clement's surveyors?

A. Yes, sir.

Q. That is the tree just as you saw it there, isn't it?

A. Yes, sir; the tree, the whole tree, was there when we were there. This is the tree; the same tree.

Q. Will you explain to the jury how that tree had grown up—the maple?

268 A. That tree was standing on top of a flat sandstone that I think was probably two feet across, and the roots grew from this maple just as we saw them here, down from the top of this stone into the marshy ground; the ground is marshy and stony. * * *

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Q. State if it is possible to count a gum tree anything near what is correct.

A. I have looked at the tree, and I don't think it is possible to count the tree. I have tried to count a great many, but I haven't succeeded in counting them. I don't believe they can be counted.

Q. You never have been able to count a gum, although you have tried it frequently?

A. Yes, sir; never been able to count it.

Q. Did you ever in your life know of an ancient mark to be determined by a gum mark?

A. I never did. I never heard a man say he could count it until I came into this court.

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The plaintiffs also produced GEORGE DICKSON, a civil engineer and land surveyor, of Pittsburgh, who, *inter alia*, testified as follows in reference to the gum witness and maple corner:

Q. State whether you ever examined them to ascertain whether that could be counted or not.

269 A. Yes, sir; I made an effort to count them.

Q. State whether you could make anything out of them.

A. No, sir; I was not able to count them.

Q. Is it or not possible to count them?

A. I think not. I couldn't do it. I don't think it could be done.

Q. In your experience for 30 years state whether you have been able to count a gum tree satisfactorily.

A. I never saw one in which I could count the sap wood; they can be counted in the heart; the sap wood cannot be counted.

Q. This is true of any gum?

A. Of any gum I ever saw. There may be different species. I never saw any other than this gum; this is the one kind that grows in this neighborhood, Western Pennsylvania, so far as I know.

Q. You have examined this large gum before you that was designated as the witness?

A. Yes, sir; this is the one (referring to gum).

* * * * * * *

On cross-examination witness stated:

Q. Did you ever try to count a gum before?
A. I tried it in my younger days; not for a long time.
Q. How long since did you try to count a gum?
A. Twenty or twenty-five years.

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GEORGE KENNEDY, a civil engineer and surveyor, of Pittsburgh, being duly sworn, testified, *inter alia*, as follows:

Q. State whether you were called to examine the gums that are before you there, the two gums.
A. Yes, sir; I examined that one and this hollow gum here (pointing).
Q. State whether you made an effort to count it to ascertain whether they could be counted.
A. I examined this one very closely, but I failed to count anything on it at all except in the centre; you could count it in the centre there, but in the sap wood you could not count it at all.
Q. How is it about the hollow gum?
A. Well, I don't think there is any difference in the sap wood of the two.
Q. State whether you have ever in your life been able to count a gum.
A. I never have been.
Q. Assuming, Mr. Kennedy, that this gum has a mark upon it, state whether, in your judgment, it was possible to ascertain the age of those marks by counting the gum.
A. I don't think it would be; I don't think it would be possible to ascertain it.

271 Q. Have you examined the part which has been cut away and exposed—the inner opening of the tree?
A. Yes, sir.
Q. To ascertain what that injury was?
A. In my opinion it was simply a bruise from another tree or something falling against it; I cannot see any indication of any axe mark whatever.

On cross-examination Mr. KENNEDY stated as follows:

Q. How many gum trees have you tried to count?
A. I never counted them very often; the first time I tried to count it I found out I couldn't count it.
Q. You tried but once?
A. I only tried to count one; one I have referred to; I tried before on a farm.
Q. You blocked that one?
A. Yes, sir; I and another party blocked it and I tried to count it.
Q. And the first one you tried to count since was this one?
A. Yes, sir.
Q. Did you cut anything out of it?
A. No, sir.

Q. Did you try to count it?
A. I seen there was no use counting that sap wood.
Q. Don't you know there were 50 growths counted in that by some person, in that tree?
A. No, sir; it wasn't done.
272 Q. Nobody counted 50 growths in your presence?
A. No, sir.
Q. You say you tried to and give it up without coming to any result?
A. Yes, sir.

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Plaintiff also called A. K. WHITE in rebuttal, who testified with reference to the block taken from the tree 140 rods west of the south-east corner of the Samuel Lobdell, *inter alia*, as follows:

Q. You counted it?
A. Yes, sir.
Q. What age did it count?
A. It counted 82 years.
Q. When was it taken from the tree?
A. Well, it was taken between September, 1879, and the trial of that case, I believe.
Q. Assuming it was taken in September, 1879, how many years did it register from all the growths of the mark of 1793?
A. Four years.
Q. State whether you examined it to ascertain whether it was an axe mark.
A. Yes, sir; I examined the block.
Q. What was your conviction at the time?
A. My conviction was it was not an axe mark.
273 Q. Did you so communicate it to Mr. Clement's counsel?
A. Yes, sir.

And thereupon the counsel for the plaintiff and defendant requested the court in writing to charge the jury as follows:

274 In the Circuit Court of the United States, Western District of Pennsylvania. November Term, 1881.

E. A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

The counsel for plaintiff respectfully ask the court to charge the jury as follows:

1st. That according to all the evidence in the case the batch of eleven surveys, beginning with the Daniel Reese, the leading warrant on the west, and extending to the Samuel Lobdell on the east, have their north line regularly run and the corners and line clearly marked and defined upon the ground; that the line so run and marked indicates and points out the location as the deputy surveyor laid them upon the ground; that the surveys having been returned

into the land office and allowed to remain there unquestioned for a period of more than twenty-one years, the presumption of law is conclusive that the deputy surveyor ran the lines upon the ground according to the shape and form of the official drafts of such surveys returned by him into the land office, and that such presumption is not rebutted by failure to find marked lines upon the ground at the official distances called for in the returns of the survey after the lapse of a period of eighty years.

2nd. That in the absence of marks upon the ground indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances, as shown by the official return
275 of survey, and cannot be extended to the south beyond their official distances.

3rd. That the fact that the corner claimed by the defendant as the corner of the Billington and Reynolds south is about sixty rods south of the official distance of said surveys, and that no lien has ever been found between said claimed corner and the maple corner near the end of the official distances of said suveys found by Rockefeller and others, although there are timber trees standing between said points which could and probably would have been marked if any line had been run there; and the further facts that no marks bearing the date of 1793 have ever been found upon the line claimed or running east from said corner for a distance of more than two miles tends strongly to disprove and to discredit the said corner claimed by the defendant as the true corner on south of Billington and Reynolds.

4th. That the evidence shows that the eleven warrants in the name of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell were all taken out of the land office at the same time, the purchase-money was paid by one person, and the surveys made in one body and at one time for a single ownership, and that they were surveyed together as a single block on the 2d and 3d of October, 1793; that under such circumstances the eleven surveys adjoining and calling for each other constitute a single block and for all purposes of this case are to be regarded as such. The fact is undisputed that the
276 northern line was run and the corners and line well and distinctly marked upon the ground, and the dividing line between the Billington and Reynolds was also run and marked upon the ground to a small maple corner called for as the southwest line of the Thomas Billington and the southeast corner of the John Reynolds. If the jury believe the testimony of David Rockefeller, William F. Roberts, Samuel Adams, and Frank Leisenring that they found the small maple corner in the fall of 1847, called for in the official returns of these surveys, such corner would definately fix the southern boundary of the eleven surveys, and the plaintiff would be entitled to a verdict for the land in controversy.

5th. It being proved and not disputed in this case that the north-

ern line of the Brush Valley surveys is well marked on the ground, and the corners of said surveys designated by the original marks definately fix the location of each individual survey in the batch, that in the absence of marks to fix definately the southern boundary, the survey of the said batch must be located from the northern lines by running out courses and distances of said surveys according to the official returns of William Gray.

277 6th. That where the deputy surveyor located the eleven Brush Valley surveys on the ground on the second & third days of October, 1793, is a question of fact depending upon the marks upon the ground then made by the deputy surveyor for these tracts. The said eleven surveys were so located upon the ground as to be surrounded on three sides—north, south, and east—by vacant land. After the lapse of 90 years, in the absence of marked lines to the contrary, the presumption is conclusive that this land was surveyed upon the ground just as the eleven surveys were returned into the office, and patents having been granted for these eleven surveys in 1794, ten of them to John Nicholson and one to Robert Morris, according to the courses and distances as returned into the land office, the lines and quantity of land were definately fixed for each tract, and the true and proper way to now run them out is to start from the leading warrant, Daniel Reese, on the west and from the marked lines on the north and lay each tract off according to its courses and distances. The law determines the proper mode by which surveys are to be located, and the opinions of surveyors as to how these lands ought to be located or how they were originally put upon the ground cannot be received to change the manner of locating surveys determined by the law.

278 7th. The calls of the surveys of 1794 in the name of Richard Martin on the east and of the surveys of 1794 on the west, in the name of Joseph Tyson and Thomas Reese, Jr., or the work found upon the ground younger than 1793, cannot affect the location of the block of eleven surveys. Hence the location of the Richard Martin to attach to the "post by the pine" corner as its southeast corner cannot be used to extend the lines of the Lobdell survey, and thus all of the eleven surveys south beyond the official distance; and all the evidence and opinions of surveyors as to the location from the "post by the pine" and extending the eleven surveys by this line southward 34 perches or thereabouts at the Lobdell, and thus extend the whole batch of eleven south, must be disregarded by the jury, so far as it is sought to use the lines of the Martin to extend the lines of the eleven surveys beyond their official courses and distances.

8th. That the Richard Martin does not call to adjoin the Brush Valley surveys or any of them on the south, and that therefore the lines or marks upon the lines of the Richard Martin cannot be used to extend the lines of the Brush Valley surveys to the south beyond their official distance returned into the land office.

9th. If the jury believe that the southeast corner of the Samuel Lobdell was fixed by the deputy surveyor at 320 rods from the northeast corner thereof, and that only about 150 rods of the south

line of the Richard Martin was marked upon the ground from the "post by the pine" westward, and that no more of said line was run upon the ground, the Richard Martin would in such case obey its call for the Samuel Lobdell, and it would be proper to
279 change the course of said south line so as to extend it to the southeast corner of the Lobdell at 320 rods from the northeast corner of said Lobdell.

10th. That all the witnesses of the defendant have testified that in their opinion all the marked lines on the north, northeast, and on the south of the Richard Martin were made in 1793, and before the warrant was issued for the Richard Martin survey; that no lines were marked on the west, and that the lines on the east adjoining the Francis West were made for the said West survey, it being older than the Martin, and being a survey of 10th September, 1793. If this is true, then the lines belong to the Martin only by adoption, and shows that the Richard Martin was not in fact actually surveyed and marked upon the ground by the deputy surveyor, but that, on the contrary, the survey of the Martin was only plotted on paper and returned into the land office. The call, therefore, by the Martin for the Samuel Lobdell on the west of the Martin is not such a call for the Samuel Lobdell as to increase the east line of the Samuel Lobdell beyond its official distance.

280 11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jessie Brooks, and other older surveys on the south, and call to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds on the north; that in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor, the William Elliott may go to its calls for adjoiners on the north; that as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official courses and distances from their northern line, or from the Rockefeller maple corner.

12th. That under all the evidence in the case the plaintiff is entitled to a verdict.

281 *Defendant's Points.*

In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

The counsel for defendant respectfully ask the court to charge the jury as follows:

1st. That surveys made and returned as a block are to be located as a block, and that marks, courses, distances, and calls of any one of the tracts are to be considered as applicable to all, with like effect as if the entire block was but one survey.

By a block of surveys is meant a number of surveys made on the same or successant days upon a batch of warrants issued at the same time and returned together, the surveys being located so as to adjoin and calling for each other in succession.

2d. Surveys constituting a block are not to be treated as separate and individual surveys, and each tract located independent of the rest by its own individual lines or calls or courses and distances, but such surveys are to be located together as a block or one large tract. Surveys made and returned as a block must be located upon the ground in a block, whether lines can be found upon the ground or they were chamber surveys. If lines and corners made for such block of surveys can be found upon the ground this fixes the location of the block, even to the disregard of calls for adjoiners.

282 The lines courses found upon any part of a block of surveys belong to each and every tract of the block as much as they do to the particular tract which they adjoin.

3rd. The proper way to locate two adjoining surveys or two adjoining blocks, where the junior calls for the older, is to first locate the older and then give the junior whatever land there is left, unless there may be marks upon the ground which would prevent the junior going to its calls.

4th. The lines run upon the ground constitute the actual survey, of which the marks upon the ground are the best evidence, the lines on the draft returned being inferior and secondary, serving only to indicate the place of a line where the foot-prints of the surveyor cannot be traced; when they can be traced they locate the tract or block of surveys without regard to courses and distances in the draft, whose only office is to serve as a guide where no other is left.

5th. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor, and in endeavoring to ascertain the proper location the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believe that the said two surveys which call for the Lobdell were located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdell, such fact would be of importance in as-

283 certaining the exact location of the Lobdell and of the block of surveys of which it is a part.

6th. The plaintiff must recover upon the strength of his own title, and as he has only shown title to the William Elliott survey he can in no event recover in this suit any land not embraced in the William Elliott survey.

7th. If the jury believe that the William Elliott is one of a block of surveys known as the Le Favre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks, or monuments corresponding with the date of survey of this block on the northern line of any one of these surveys would be monuments for the northern line of the

William Elliott survey and establish the northern line of the William Elliott.

8th. If the jury believe the testimony of the defendant's surveyors that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established, and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that corner would be monuments fixing the whole northern line of the Le Favre block, and a line run westward from the post by a pine corner by the official courses and distances of the northern line of said block by these trees would establish the northern line of the William Elliott survey.

284 9th. That the rule which confines a survey to its courses and distances is only applied, in the absence of other and better evidence, in order to determine the exact location, and if there is any better evidence of the monuments upon the ground whereby the exact location can be ascertained, such monuments are to be taken in preference to course and distances.

10th. That any monument on the ground called for or adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and, in the present case, if the jury believe that any part of the southern line of the block of eleven or Brush Valley block was run by the deputy surveyor either from or to intersect the "post by a pine" as a mark indicating the location of the said southern line, the said "post by a pine" would be a monument which would control the mere evidence of official distances.

11th. That where all other evidence fails, and a location must be ascertained by courses and distances alone, the courses are as important as the distances, and and if there is any monuments upon the ground to establish the exact place at which a course was run and no monument to confine the limit of the survey to the exact official distance, the true course should be taken so as to agree with such monument and the official distance ignored if it conflicts therewith.

285 12th. If the jury believe the defendant's surveyors, who testify that the chestnut oak on the south of the Samuel Lobdell, the gum witness to the corner at the swamp, and the gum line tree about six rods west of the gum witness were marked in 1793 as trees for the southern line of the Brush Valley block, such trees would be monuments for the whole southern line of the Brush Valley block of surveys, and the southern line of the said block should be located by the courses and distances of said line and these trees, and a line so run would embrace the land in dispute, and the verdict should be for the defendant.

13th. That if the jury believe any one of the said trees was marked in 1793 as a monument for the southern line of the said Brush Valley block, such tree would be a monument for the whole southern line of the said block, and said line should be located on the ground by the courses and distances of the southern line of the said block

by such tree, and a line so run would embrace the land in dispute, and the verdict should be for the defendant.

14th. If the jury find from all the evidence that the southern line of the Brush Valley block when located was run upon the ground so as to include the land in dispute the verdict should be for the defendant.

286 *Charge of the Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov'r Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

GENTLEMEN OF THE JURY: This is an action of ejectment brought by Elisha A. Packer against Ira T. Clement to recover about 120 acres of land situate in Northumberland county, Pennsylvania, which the plaintiff claims is part of a tract of land surveyed on the 22nd day of October, 1794, on a warrant to William Elliott dated the 26th day of November, 1793.

To the William Elliott tract the plaintiff has shown title.

The defendant has shown title to two contiguous tracts of land surveyed on the 2nd day of October, 1793, on two warrants dated June 11th of that year, one to Charlotte Ruston and the other to Mary Myers; and the defendant claims that the land in dispute is within the lines of these tracts—mainly within the lines of the Mary Myers.

The lands of the plaintiff and the defendant adjoin, and what is the true division line between them is the principal question in the case.

287 This question is to be solved by dertermining the location of the Charlotte Ruston and Mary Myers tracts as fixed by the deputy surveyor in 1793, the surveys of those tracts being senior to that of the William Elliott.

The Charlotte Ruston and Mary Myers are two of eleven warrants owned by Dr. Thomas Ruston, all dated June 11th, 1793, and granted respectively in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell. They were all in the hands of the deputy surveyor at the same time, and, as appears by his official returns, the surveys upon the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds were made on October 2nd, 1793. The return of the Thomas Billington survey does not show the day on which it was made, but the Mary Ruston, which adjoins it on the east, was surveyed Oct'r 2nd, 1793, and the other five, viz., the Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdell, were surveyed the next day, October 3rd, 1793.

The official returns show that Deputy Surveyor William Gray laid

all these warrants. The eleven surveys were returned by
288 him into the land office on the 3rd day of March, 1794.

These eleven tracts were located so as to adjoin each other side by side, the Daniel Reese, which was the leading warrant, being located at the western end of the series and the Samuel Lobdell at the eastern end. Each survey, from the Reese to the Lobdell, calls alternately for the adjoining survey proceeding from the west to the east in the order in which they have just been named.

The Daniel Reese calls for vacant land on the west and the Samuel Lobdell for vacant land on the east, and the whole eleven call for vacant land on the south.

They constitute a block or body of surveys and are to be located on the ground as a block. These eleven tracts are known and have been designated in this case as the Brush Valley lands.

The William Elliott is one of a block of surveys of the date of October 21st and 22nd, 1794, embracing what are now known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands. The call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds.

There is no controversy as to the southern line of the Wil-
289 liam Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans, and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793.

The William Elliott, calling on the south for these last-named surveys and on the north for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds, rightfully embraces all the land within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for by the William Elliott may be, to that line must it go.

The great question of fact for the consideration of the jury, therefore, is, Where did William Gray, the deputy surveyor, fix the southern lines of the Charlotte Ruston and Mary Myers and the other tracts of the Brush Valley block, when he surveyed them, in October, 1793?

As regards the northern line of the Brush Valley block there is no controversy. The surveyors on both sides agree that the northern line throughout its entire length was well marked in 1793 upon the ground and all the corners of the eleven tracts on the north indisputably fixed. The contest between the parties relates to the southern line of the block.

290 The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances or from a certain alleged maple corner on the south, the same practical result for the purposes of this case being reached by whichever of these two methods the location is effected.

The location upon which the defendant insists involves a wide departure from the official returns of survey. For example, the official length of the eastern line of the Samuel Lobdell is 320 rods.

The defendant's location lengthens this line 32 rods, thus carrying the southern line of the block at its eastern end that much further south.

At the division line between John Reynolds and Thomas Billington the defendant's location places the southern line of the block 61 rods south of the official distance, measuring from the north line. The official length of the western line of the Daniel Reese is 340 rods. The defendant's location, however, gives this line 426 rods, or an increase of 86 rods, thus carr-ing the southern line of the block at its western end that much further south.

If the true southern line of the Brush Valley block is where the defendant locates it the land in controversy belongs to that block and is covered by the Charlotte Ruston and Mary Myers.

291 On the other hand, if the southern line of the block is where the plaintiff contends the land in controversy is outside of that block and within the lines of the William Elliott.

The official papers call for one living corner only on the southern side of the block of eleven surveys—the Brush Valley block. This call is for a small maple at the southeast corner of the John Reynolds and southwest corner of the Thomas Billington. According to William Gray's official returns, that maple stood at the distance of 326 rods from the northeast corner of the John Reynolds and 342 rods from the northwest corner of the Thomas Billington.

If the actual position upon the ground of this maple can be established this will fix the southern line of the whole block of eleven surveys and of every member of the block, and settle the question of location with which the jury have to deal.

The plaintiff claims that this maple corner was found and located as early as the year 1847 by David Rockefeller, a surveyor, who, at that time, was surveying these lands for Hugh Bellas. Mr. Rockefeller is dead, but his testimony at a former trial has been read in this case. He testifies that in running on that occasion the

292 line between the Reynolds and Billington he found "at 340 perches" (*i. e.*, from the northwest corner of the Billington), "allowing for hills, etc., a maple stump with sprouts growing around it. The tree" (we quote from his testimony) "had apparently been about six or seven inches in diameter. It had been burnt, and the stump was about a foot high. The tree was lying down as it fell—right down the mountain—and the trunk of the tree was burnt entirely away for, perhaps, six or seven feet, with the exception of two narrow scales about an inch thick that were burned on the inside. This is a description of the tree as near as I can recollect. Then I have said in my notes, 'Old corner, maple stump.'" Mr. Rockefeller testifies that he found at that time a chestnut oak witness to the maple corner standing about eight feet west of the maple stump, which he blocked and counted.

The chain-carriers for David Rockefeller at that survey were Samuel Adams and Frank Leisenring, both of whom were produced and testified before you. William F. Roberts, a mining engineer, who was present at the survey of 1847, has also testified in the case. The

testimony of these three witnesses is corroborative in important particulars of that of David Rockefeller.

293 Several of the defendant's surveyors and also William McWilliams, whose testimony the plaintiff read, examined the chestnut oak witness (of which Rockefeller and those who were with him testify) or its remains, but at dates long subsequent to the survey of 1847. They testify that they saw no old axe mark or evidence thereof on the tree, but that it looked as if scarred by falling timber.

By the measurement of the plaintiff's surveyors, who have been examined before you, the "Rockefeller corner," as it is now designated, is a little further north than his measurement placed it. Mr. Cochran puts it 3.7ths rods north of the end of the cross-line as officially returned. Some of the defendant's witnesses by their chaining make it to be several rods still further north. Mr. Moore's measurement makes it 7½ rods north of the official call for distance. The land at this place is mountainous and rough, and in chaining it the surveyors do not precisely agree as to distance.

The defendant locates the maple corner at the edge of a swamp, at a point 387 rods south of the northeast corner of the John Reynolds, or 61 rods beyond the end of the official distance.

294 The defendant has read the testimony of John Fisher, now deceased, given upon a former trial. He states that in 1814 he was with Henry Donnel, who was surveying the lines of these tracts or some of them. In this testimony Fisher says, "We found stone corner and post that was near a small swamp at the head of the Gap run." If this statement is correct, it still leaves it altogether uncertain, both as to who made this stone corner and set up the post and the date when the corner was made. The calls in the Reynolds and Billington surveys for their common south corner, it is to be observed, are not for a stone corner and post or for either, but for a living corner, viz., a small maple.

But John Fisher had been examined at a still earlier trial, and the plaintiff has read his testimony on that occasion. He does not therein mention the finding of a stone and post corner, but, speaking of what was done at the survey in 1814, says: "When they run across the valley they made a corner at the swamp." And again: We made the corner 200 rods or more east of the pike.

The defendant claims that the corner at the edge of the swamp—the maple corner, as located by him—is witnessed by a gum tree

295 first discovered in January, 1883, by M. B. Trescott, one of the defendant's surveyors. To establish this gum witness the defendant examined four surveyors, viz., Mr. Trescott, George W. West, R. F. Brown, and H. S. Boyer. These witnesses testify that the gum bore evidence of an old axe mark and that it pointed to a small maple growing out of a stump. They, or some of them, blocked the gum and took the block to Sunbury. It was examined by these four surveyors; Mr. Trescott and Mr. Boyer say the block counted to 1793; Mr. West says it counted 88 or 89 years, adding that he thinks it was marked in 1793; Mr. Brown says he

counted it once 85 years, once 86 years, and once 89 years, and he adds that it was almost impossible to count it accurately.

The plaintiff has brought into court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block. A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state that they find no old axe mark on this exhibit and no evidence of any. Several of these witnesses testify that they saw this gum when standing, and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evidence of any ancient axe mark.

296 In the midst of this conflicting testimony, which is well calculated to excite at least a doubt, both as to the existence of an ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the defendant's surveyors took from the tree would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter—but the defendant has not produced it, nor has he given any evidence explanatory of its absence.

This block was taken out so late as January last and was in the possession or under the control of the defendant. The withholding it, then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree.

In this connection we call the attention of the jury to the evidence relating to the original work found on the line running from the northeast corner of the John Reynolds southwardly to the small maple—*i. e.*, the division line between the Reynolds and the Billington. The plaintiff has clearly shown and, indeed, the defendant's surveyors, including some who testified to the contrary at former trials,

297 state that that line is a well-marked line of the date of the original survey of 1793. Moreover, it is the only cross-line of the block upon which has been found any evidence showing actual work thereon by the surveyor. Now that the Reynolds-Billington line was actually run by the surveyor is a fact worthy of consideration; for it suggests that in returning the maple as 326 rods distant from the northeast corner of the John Reynolds the deputy surveyor had ascertained the distance not by computation or protraction, but by actual measurement. It is indeed true that chaining might not insure against mistake. Yet, the line having been actually run upon the ground by the deputy surveyor, we might fairly expect to find the maple at the end of the line as officially returned or within a reasonable distance thereof.

One other fact here (appearing from the uncontradicted evidence) seems to call for remark. All the marked trees on the Reynolds-Billington line are found north of the Rockefeller corner. No marked tree on the course of that line has been found between the Rockefeller corner and the point on the edge of the swamp at which the

defendant locates the maple corner, although the distance is
298 over 60 rods, and the line passes through timber old enough to bear the marks of 1793.

It appears from the evidence that frequent and careful examinations have been made by surveyors on the south of the Brush Valley block for a marked line. David Rockefeller testifies that he was never able to find any evidence, on the ground that William Gray in locating this body of lands made *any* mark for the southern boundary except the maple corner; and prior to 1879 no surveyor of either side was able to discover any evidence, on the ground that the deputy surveyor actually ran the southern line of the block.

And just here is a fact deserving of consideration. While the official returns of the eleven tracts call for no less than 29 living corners (*i. e.*, trees) along the northern line, on the southern side of the block out of 17 corners called for but one is a living corner, viz., the Reynolds and Billington maple. The plaintiff's surveyors say that these calls for posts indicate that the deputy surveyor did not actually run the southern line, but, working from the northern line with the aid of the cross-line at the division between the Reynolds and Billington, he finished his work by protraction or plot-
299 ting. Several of the defendant's surveyors express a contrary opinion. One of them, however, T. W. Moore, states that as a rule surveyors take it for granted that where only posts are called for the line was not run on the ground.

In considering the fact that sixteen post corners and only one living corner are called for upon the southern line of the block, the jury should bear in mind the evidence in the case respecting the timber through which that line passes, whether upon the plaintiff's or the defendant's location.

The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793.

One of these is a chestnut oak at 140 rods westwardly from the southeast corner of the Samuel Lobdell, which tree was discovered and blocked by A. J. Guffey, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffey, Mr. West, and Mr. Boyer testify counted back to 1793.

T. W. Moore, however, one of the defendant's surveyors, says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands.

A. K. White, a surveyor, testifies that he counted this block
300 at Lock Haven at a previous trial, and that it counted but 82 years, which would make it too young by four years for the survey of 1793.

To the like effect is the testimony of George B. Strauth and Robert Ammeman, surveyors, whose testimony at the trial at Lock Haven has been read in this case.

William T. Mitchell also counted the block at the Lock Haven trial, and he testifies that it counted but 82 years.

Here, then, is a direct conflict between the expert witnesses who

have examined the block from the Chestnut oak, and the greater number testify that the count fell short of the survey of 1792 by four years.

The block itself which, in connection with expert testimony, might have aided you essentially as well in correctly determining whether it bore an ancient axe mark at all (which is seriously disputed), as in solving the controverted question of age, has not been produced by the defendant nor its absence accounted for. The evidence traces the block into the defendant's possession. It was used by him as an exhibit at the Lock Haven trial, and it was there called in question as it is here. Why is it now absent when it so vitally affects the case?

This chestnut oak tree was examined by Mr. Edeburn,
301 Robert McAdams, and A. B. Cochran in January, 1882. It had then fallen, but these witnesses state it had on it the leaves, they think, of the previous year, showing that it was still living in 1881. They testify there was no evidence of an ancient axe mark on any part of the tree, and they give it as their opinion that the mark on the eastern side of the tree from which the defendant's block was taken was caused by a bruise or hurt. They blocked the western side of the tree and also took out a block from the eastern side. These blocks are before you. Doubtless you will recall what the witnesses testified in respect thereto.

It is testified that if this chestnut oak were a line tree it should properly have been marked on its western side as well as its eastern side; but the witnesses last named testify that it had no evidence whatever of an axe mark on that side.

The other tree on his southern location, which the defendant claims to be a line tree of the survey of 1793, stood some six rods westwardly of the Reynolds-Billington corner as located by him. Several of the defendant's surveyors testify that this gum bore two axe marks made at different times, the one overlapping the other, with a growth of new wood between them. The over mark, these witnesses state, counted to 1814. Mr. Trescott and Mr. West
302 testify that the inner axe mark counted back to the survey of 1793. Mr. Brown, however (defendant's witness), says he counted from fifteen to eighteen growths between the two axe marks, but that it was impossible to count all the growths accurately, the wood being in part rotten; and Mr. Boyer (defendant's witness), says that for this reason he was unable to count this gum beyond 68 years.

The defendant did not produce for your inspection the block or blocks which his surveyors took from this alleged gum line tree, but the plaintiff, as part of his rebutting case, brought into court and has exhibited to you that part of the tree which the defendant's surveyors blocked and it speaks for itself.

Much testimony has been given to show that under the most favorable circumstances the count of a gum is uncertain and unreliable.

It is for you to say, under all the evidence, of what value in establishing this disputed line is this gum, a specimen of which is before you.

We submit to you to determine as a question of fact, under all the evidence in the case bearing thereon, whether or not the chestnut oak and the two gums (the alleged witness to the maple corner
303 and liner) are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block. If you find that they are or that any one of them is such marked tree, then the defendant would be entitled to your verdict.

It is, however, proper that we should here remind you that the southern line of the block is not less than seven miles long; that the evidence tends to show that along a great part of this line, whether upon the plaintiff's or the defendant's location, there is much timber old enough to bear the marks of the survey of 1793, none of which bears such marks, unless it be the three trees in question, and that these trees are found from 30 to 60 rods outside of the official courses and distances of the surveys as returned into the land office.

As the defendant alleges that these trees bear the marks of the survey of 1793, the burden of proof under the circumstances to establish the fact is upon him, and the jury ought not to find the fact in his favor unless they are satisfied that it is established by the preponderance or weight of the evidence.

We now direct your attention to another branch of the case.

There lies to the east of the Samuel Lobdell and adjoining
304 it a tract of land surveyed by William Gray upon a warrant to Richard Martin; that warrant issued January 22d, 1794, and the survey thereon, according to the official return, was made on the 23rd of February of that year. It was, it would seem, returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later.

The Richard Martin, therefore, is a survey junior to the Samuel Lobdell and its fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and the other warrants of the Brush Valley batch, but in the face of the official returns this opinion is entirely worthless. In the nature of the case, it is a matter of pure speculation on the part of these surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years.

305 The Richard Martin calls on the east for the Francis West, a survey of September 10th, 1793, and these two surveys have a common south corner, viz., "a post by a pine;" but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly 32 rods beyond its official length to overcome a mistake. The official length of that line is 250 rods, whereas the actual length is 282 rods. The south line of the Richard Martin running from the post by the pine is north 89¾° west 308 perches to a post. There is evidence tending to show that

for the distance of about 150 perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is 320 rods long, the same as the Lobdell's east line.

Now, the defendant's surveyors claim that even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell and 32 rods
306 further south than the deputy surveyor supposed it was, as is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner 32 rods south of the southeast corner of the Samuel Lobdell, as defined by William Gray's official return, and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about 32 rods further south than its official return locates it, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be 86 rods.

To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what
307 the deputy surveyor did in locating the Richard Martin has been admitted in evidence and may be considered by the jury in connection with all the other evidence in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block, but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line, according to the official courses and distances (unless indeed the jury should find in favor of David Rockefeller's location of the maple corner).

The authentic marks and corners upon the northern line (the evidence abundantly shows) are amply sufficient to locate the whole block of eleven surveys and every member thereof in conformity with the official returns of survey.

Now, it is a settled rule of law that in the absence of marked lines or monuments upon the ground or calls to indicate where the line

or lines of a survey should be there the courses and distances
308 & 309 as officially returned must be resorted to in order to fix and define the boundaries.

After the lapse of twenty-one years from the return of the survey into the land office the presumption of law is that the warrant was located as returned by the surveyor, and in the absence of proof of marked lines or monuments to the contrary or of rebutting calls, the presumption that the survey was located as returned must prevail, and the official courses and distances will govern.

In this case nearly ninety years have elapsed since Willam Gray filed in the land office his official returns of survey of the Brush Valley block, and unless you find the existence of marks or monuments upon the ground differing from the official courses and distances, the latter must control.

(Here the court read and answered the points.)

The result of our general instructions and answers to the points may be thus stated:

1. If the jury find from all the evidence in the case that the true location of the maple corner called for by the John Reynolds and Thomas Billington is at the place where David Rockefeller located in 1847, then the verdict should be for the plaintiff.

310 2. If, however, the jury find from all the evidence in the case that the chestnut oak and the two gums upon which the defendant relies are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block, or that any one of them is such marked tree, then the verdict should be for the defendant.

3. But should the evidence fail to satisfy the jury that said chestnut oak and gums or any of them are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern line of the block by running out the courses and distances as shown by the official returns of survey, and the verdict must be for the plaintiff.

[Endorsed:] No. 19. Nov'r term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Charge of the court. Filed Dec'r 29, 1883. Copy.

311 *Answer to Plaintiff's Points.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov'r Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENTS. } No. 19.

1st point. This point is affirmed, striking out the word "conclusive." There is a presumption of law that the deputy surveyor ran the lines according to his official returns of survey, which is not rebutted by such negative evidence as is mentioned in the point, and nothing will overcome that presumption short of affirmative proof of lines

run upon the ground variant from the official surveys as returned into the land office.

2nd point. This point is affirmed.

3rd point. The facts mentioned in this point have already been brought to the attention of the jury in our general charge, which we think sufficiently answers the point.

4th point. This point is affirmed.

5th point. This point is affirmed.

6th point. This point is, we think, sufficiently covered by our general charge.

7th point. This point is, we think, sufficiently covered by our general charge.

312 8th point. This point is, we think, sufficiently covered by our general charge.

9th point. We do not feel called on in this case, especially in view of the conflicting testimony of the surveyors, to give a binding instruction as to the proper location of the southwest corner of the Richard Martin.

10th point. We think that, in so far as is necessary, this point is covered by our general charge.

11th point. This point is affirmed.

12th point. This point is refused.

Answers to the Defendant's Points.

1st point. This point is affirmed.

2nd point. This point is affirmed.

3rd point. This point is affirmed.

4th point. This point is affirmed.

4½ point. We do not feel called on in this case, especially in view of the conflicting testimony of the surveyors, to give a binding instruction as to the proper location of the southwest corner of the Richard Martin.

5th point. The jury may take into consideration the acts of the deputy surveyor, mentioned in this point, in determining the question whether or not the chestnut oak and the gums are trees marked by the surveyor in 1793 (as the defendant claims) to define
313 the southern line of the block of eleven surveys, the Brush Valley block, but should the jury find that none of those trees were marked for the survey of 1793, then the facts upon which this point is based would be of no importance in determining the controversy in this case.

6th point. This point is affirmed.

7th point. This point, as a whole, is refused. The William Elliott calls on the north for the Charlotte Ruston and Mary Myers and other members of the Brush Valley block, and no marks on the ground have been found to limit that call. Moreover, the official return of the Lewis Walker survey, one of the Le Fevre block, which adjoins the William Elliott on the east, adopts the Reynolds-Billington maple as a northern monument for the Walker. As we have already instructed the jury in our general charge, wherever the true

line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go.

8th point. This point is refused.

9th point. This point is affirmed.

10th point. As a naked proposition, this point is correct and it is affirmed; but the jury will understand, from our general charge, that if they find that the chestnut oak and gums, upon which the defendant relies, are not trees marked by the surveyor in 1793 to
314 define the southern line of the Brush Valley block, the post by the pine would have no control in the location of that block.

11th point. This point is affirmed.

12th point. This point is affirmed.

13th point. This point is affirmed.

14th point. This point is affirmed.

[Endorsed:] No. 19. Nov'r term, 1881. Elisha A. Packer *vs.* Ira T. Clement. Answers of the court to the plaintiff's and defendant's points. Filed Dec. 29, 1883. Fee, $1.00. Copy.

315 And thereupon the said defendant did then and there except to the several portions of the aforesaid charge of the said court and answers to such of the said points of the plaintiff and defendant as are specifically excepted to and set forth in the following bills of exceptions thereto, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such case made and provided, and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to the several bills of exceptions thereunto hereafter set forth, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, 1883.

M. W. ACHESON.

316 *Bill of Exceptions No.* 1.

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. Nov. Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury empannelled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the defendant, by his counsel, to maintain the issue on his part, offered in evidence to the jury a certain book from the commissioners' office of Northumberland county, endorsed, "1796, returns of the deputy surveyor for the townships of Augusta, Catawissa, Shamokin, and Mahanoy, by William Gray," and endorsed at the head, "This calculation is made in conformity with the county levy law of 1795," and to read the following entries therefrom:

317

No.	Name of warrantee.	Present owner.	Situation & remarks.	Acres.	
219	Richard Martin	Dr. Thomas Ruston	Adjoining Francis West on waters of Roaring creek	419¾	$293 78
220	Samuel Lobdell	do.*	Adjoining the above do.	411	205 50
221	Joshua Bean	do.*	do. do.	229¾	215 78
222	John Young, merchant	do.*	do. do.	406¼	203 00
223	Mary Ruston, Jr.	do.*	do. do.	380¼	190 00
224	Thomas Ruston	do.*	do. do.	418½	209 00
225	Mary Ruston	do.*	do. do.	434½	217 00
226	Thomas Billington	do.*	do. do.	411	205 00
227	John Reynolds	do.*	do. do.	444½	222 25
228	Mary Myers	do.*	do. do.	443½	221 75
229	Charlotte Ruston	do.*	do. do.	426¾	213 50
230	Daniel Reese	do.*	do. do.	386¼	193 00

* Now Asylum Company.

318 And the following certificate to the return:

"GENTLEMEN: I have made this return as exact as it was in my power from the papers in my hands, and am, gentlemen, with respect, your humble servant,

"WILLIAM GRAY, *Surveyor.*"

Directed to Richard Daring, Henry Vanderslice, and Nathan Stortman, commissioners:

To show, 1st, that these lands were returned for the purpose of taxation in accordance with the act of Assembly of 1795, beginning returns by the deputy surveyor of the county; 2nd, for the purpose of showing that they were returned as a block owned by the same party by the deputy surveyor, who purports three years before to have located these surveys upon the ground as evidence to show not only that the eleven but that the Richard Martin survey was part of the block with the eleven lying west of it and called the Brush Valley block, and was so considered by the surveyor who located them on the ground; 3rd, for the purpose of showing the official acts and declarations of William Gray, the deputy surveyor, with reference to these surveys, and for the purpose of showing their return for the purposes of taxation; to be followed by a treasurer's sale of said land.

319 To which the plaintiff's counsel objected as follows:

"Objected to by counsel for plaintiff for the purposes stated in the offer, upon the ground that the return of the deputy surveyor under the act of Assembly is only for the purpose of taxation, and that it has no tendency to prove, and does not by his declarations, or make evidence of a block of surveys so as to embrace the Richard Martin, a survey of 1794, a portion of a block of surveys made in 1793. Further object to the return so far as it relates to the ownership of the property for the warrants returned, on the ground that the deputy was incompetent to establish the ownership of the surveys returned; does not object to the book if confined to the purpose stated in the offer of showing the fact of return by the deputy surveyor of these surveys for the purpose of taxation. Counsel for plaintiff further object that the purpose stated in the offer is immaterial and irrelevant. The deputy surveyor-, as directed by the act of Assembly, make returns of all warrants executed by them in their respective districts to the county commissioners; the object of which return was to enable the commissioners to charge the land with taxes.

320 The returns of William Gray, to which reference is made, show that he executed between seven and eight hundred warrants and made return of the same to the county commissioners. The offer contains no proposition to show that these lands were taxed and taxes paid by any person claiming the lands under whom the defendant claims. It contains no offer to show that the lands were taxed and sold and title acquired by such sale by the defendant or by any one under whom he claims. For any other purpose, therefore, than the purpose of showing the assessment or payment of taxes

and the assessment and sale of lands, the evidence would be irrelevant and immaterial in this case and incompetent. The declaration of a deceased surveyor while doing an act may be evidence in the nature of hearsay, but the declarations of a deputy surveyor three years after he has completed and forwarded his return as to the survey and location of a tract of land or a number of tracts of land would not be evidence, either as hearsay or otherwise. Further, the declaration of a deputy surveyor in making return for the purpose of taxation would not be evidence of boundary or location.

321 Object further to that portion of the offer which states that the defendant proposes to follow it by a treasurer's sale of the land as indefinite, as not containing any proposition or offer to follow it with any sale within forty years after that return was made, and that this return is not an assessment, the deputy surveyor not being a taxing officer."

The court sustained the objection and rejected the evidence and made the following ruling:

The COURT: "We are of opinion that the evidence embraced in this offer is inadmissible on the question of location, and that it is not admissible in any aspect of the case unless the defendant proposes to connect the return of the deputy surveyor with the subsequent tax sale under which the defendant claims."

To which decision the defendant's counsel excepted and prayed the court to seal this his bill of exceptions, which is done accordingly this 30 day of Nov., A. D. 1883.

M. W. ACHESON. [SEAL.]

322 2 *Exc'tion.*

In the Circuit Court of the United States for the Western District of Pennsylvania Nov'r Term, 1881.

ELISHA A. PACKER *vs.* IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empannelled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the plaintiff made the following offer of evidence and sustained the issue on the part of the defendant:

"Counsel for defendant offer in evidence the patents to Peter Grant for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham surveys, being the Le Fevre block; William Elliott, dated the 13th of April, 1797; the Lewis Walker, the 12th of August, 1797; the Nathaniel Brown, the 13th of April, 1797; the Ebenezer Branham, the 17th of April, 1797, and the William Shannon, the 13th of April, 1797, for the purpose of locating and showing that the Commonwealth con-

firmed the location of the said surveys as a block by granting
323 patents to one of them, and also for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys," and prayed the court that the same might be read and given in evidence to the said jurors; to which the counsel for the plaintiff objected as follows:

"Counsel for the plaintiff object upon the ground that he claims under Dr. Ruston, who, by virtue of the payment of the purchase-money for several tracts of land known as the Le Fevre lands, was the owner thereof; that his title began with the inception of the purchase from the Commonwealth and location of the lands upon the ground in 1793. The patent or patents appeared to have been issued to a stranger, and show no connection between himself and the warrantee or Dr. Ruston, and therefore the patent is not evidence as against Dr. Ruston or those claiming under him for any purpose whatever. The patent is not evidence upon the subject of location in any event, the question of location resting on the evidence in connection with the official survey itself. The patent is a completion of the title and definitely fixes the quantity of land intended to be conveyed by the Commonwealth when such land is granted either to the warrantee or the party holding the right, title, and interest to the patent."

324 The court sustained the objections and rejected the evidence.

And thereupon the counsel for the said defendant did then and there except to the aforesaid opinion of the said court, and, inasmuch as the said opinion then excepted to did not appear upon the record, the said counsel for the said defendant did then and there tender their bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid to be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for defendant, did put their seals to this bill of exception, pursuant to the aforesaid statute in such case made and provided, this 11th day of Dec., A. D. 1883.

M. W. ACHESON. [SEAL.]

325 3 *Exception.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. Nov. Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this case between the said parties, before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon.

M. W. Acheson, the defendant, by his counsel, made the following offer of evidence:

"Counsel for defendant offer in evidence deposition of John Fisher, taken on rules to take depositions in cases numbered 394, 395, 396, and 397 of January term, 1874, in the common pleas of Northumberland county and 103 of November term, 1872, of the same county, and agreed to be read in all the cases, subject to exceptions as to incompetency (*prout* deposition hereto attached and made part of this bill), it being admitted by both parties that John Fisher is dead," and prayed that the same might be given and read in evidence to the said jury; to which the counsel for the plaintiff objected as follows:

Counsel for plaintiff object to the paper offered as the deposi-
326 tion which purports to be a deposition taken under an agreement between counsel to be read on the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and the Northumberland Coal Co. was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of the court; that the several cases referred to in deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials, and it was never competent to meet it under the rules of the court, John Fisher being at the time living and able to attend court, and his testimony was taken in those trials and it was printed in the paper book from which the testimony of deceased witnesses have been read on the trial of this case.

And plaintiff further objects for the reason that it was taken between other parties, and that he is neither privy nor party to the suit in which the deposition was taken, and that he claimed by title derived at sheriff's sale, a legal process, a portion or all the property that was claimed by the Northumberland Coal Company, the party to the former action.

And, further, that the deposition on its face shows that the
327 declarations which are offered to be proven by the deposition were not a part of any *res gesta* and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declarations relate, but they were of past matter of which there is no evidence that the declarant had any knowledge. Plaintiff further objects that the declarations referred to in the deposition were made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act of which there is no evidence of which the declarant had any knowledge other than his own declaration.

"It is admitted that the deposition of John Fisher, filed in court of common pleas of Northumberland county, at No. 394, of January term, 1874, in the case of Ira T. Clement *vs.* The Northumberland Coal Company, of June 12, 1878, *that it* was taken May 13th, 1878, after the verdict of the jury in that case and after the witnesses had testified at the trial of the case."

The court sustains the objections to the declarations of Henry Donnell and rejects those portions of the deposition embraced in

brackets, and at the instance of the defendant seals this bill of exceptions this 17th day of December, 1883

M. W. ACHESON. [SEAL.]

328 In the Court of Common Pleas of Northumberland County, Pennsylvania, of the Term of January, 1874.

I. T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY. } No. 394.

Action.

And now, to wit, the 26 day of April, A. D. 1878, at the instance of the plaintiff, rule entered to take depositions of witnesses to be read in evidence on the trial of the above-stated cause, *ex parte*, rule on ten days' notice.

Extracted from the records and certified the 26th day of June, 1878.

GEO. D. BUCHER,
Dep. Prothonotary.

To the Northumberland Coal Company:

Take notice that in pursuance of the above rule the depositions of witnesses will be taken before J. K. Davis, Jr., notary public, or before some one competent and legally qualified to administer oaths or affirmations in Pennsylvania, at the office of Simon P. Wolverton, Esq., in Sunbury, Pennsylvania, on Monday, the thirteenth day of May, A. D. 1878, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, at which time and place you are requested to attend if you see proper.

[SEAL.]

S. P. WOLVERTON,
Pl'ff's Att'y.

Copy.

April 26, 1878.—Service accepted.

W. H. M. ORAM,
Att'y pro Def't.

329 In the Court of Common Pleas for Northumberland County, Pennsylvania, of the Term of January, 1874.

IRA T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY. } No. 395.

Action.

And now, to wit, the 26 day of April, A. D. 1878, at the instance of the plaintiff, rule entered to take depositions of witnesses to be read in evidence on the trial of the above-stated cause, *ex parte*, rule on ten days' notice.

Extracted from the records and certified the 26th day of April, 1878.

GEO. D. BUCHER,
Dep. Prothonotary.

To the Northumberland Coal Company:

Take notice that in pursuance of the above rule the depositions of witnesses will be taken before J. K. Davis, Jr., notary public, or before some one competent and legally qualified to administer oaths or affirmations in Pennsylvania, at the office of Simon P. Wolverton, Esq., in Sunbury, Pennsylvania, on Monday, the thirteenth day of May, A. D. 1878, between the hours of ten o'clock a. m. and 4 o'clock p. m. of said day, at which time and place you are requested to attend if you see proper.

[SEAL.] S. P. WOLVERTON,
Pl'ff's Att'y.

Copy.

April 26, 1878.—Service accepted.

W. H. M. ORAM,
Att'y pro Def't.

330 In the Court of Common Pleas for Northumberland County, Pennsylvania, of the Term of Jan'y, 1884.

IRA T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY. } No. 396.

Action — ejectment.

And now, to wit, the 26 day of April, A. D. 1878, at the instance of the pl'ff's att'y, rule entered to take depositions of witnesses to be read in evidence on the trial of the above-stated cause, *ex parte*, rule on ten days' notice.

Extracted from the records and certified the 26 day of April, 1878.

GEO. D. BUCHER,
Dep. Prothonotary.

To the Northumberland Coal Company:

Take notice that in pursuance of the above rule the depositions of witnesses will be taken before J. K. Davis, Jr., notary public, or before some one competent and legally qualified to administer oaths or affirmations in Pennsylvania, at the office of Simon P. Wolverton, Esq., in Sunbury, Pennsylvania, on Monday, the thirteenth day of May, A. D. 1878, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, at which time and place you are requested to attend if you see proper.

[SEAL.] S. P. WOLVERTON,
Pl'ff's Att'y.

Copy.

April 26th, 1878.—Service accepted.

W. H. M. ORAM,
Att'y pro Def't.

331 In the Court of Common Pleas for Northumberland County, Pennsylvania, of the Term of January, 1874.

IRA T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY. } No. 397.

Action.

And now, to wit, the 26 day of Ap'l, A. D. 1878, at the instance of the pl'ff's att'y, rule entered to take depositions of witnesses to be read in evidence on the trial of the above-stated cause, *ex parte*, rule on ten days' notice.

Extracted from the records and certified the 26 day of April, 1878.

GEO. D. BUCHER,
Dep. Prothonotary.

To the Northumberland Coal Company:

Take notice that in pursuance of the above rule the depositions of witnesses will be taken before J. K. Davis, Jr., notary public, or before some one competent and legally qualified to administer oaths or affirmations in Pennsylvania, at the office of Simon P. Wolverton, Esq., in Sunbury, Pennsylvania, on thirteenth day of May, A. D. 1878, between the hours of ten o'clock a. m. and 4 o'clock p. m. of said day, at which time and place you are requested to attend if you see proper.

[SEAL.] S. P. WOLVERTON,
Pl'ff's Att'y.

Copy.

April 26, 1878.—Service accepted.

WM. H. M. ORAM,
Att'y pro Def't.

332 In the Court of Common Pleas for Northumberland County, Pennsylvania, of the Term of November, 1872.

IRA T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY and WILLIAM GRIFFITH. } No. 103.

Action.

And now, to wit, on the 26 day of Ap'l, A. D. 1878, at the instance of the pl'ff, rule entered to take depositions of witnesses to be read in evidence on the trial of the above-stated cause, *ex parte*, rule on ten days' notice.

Extracted from the records and certified the 26 day of April, 1878.

GEO. D. BUCHER,
Dep. Prothonotary.

To the Northumberland Coal Company:

Take notice that in pursuance of the above rule the depositions of witnesses will be taken before J. K. Davis, Jr., notary public, or before some one competent and legally qualified to administer oaths or affirmations in Pennsylvania, at the office of Simon P. Wolverton, Esq., in Sunbury, Pennsylvania, on Monday, the thirteenth day of May, A. D. 1878, between the hours of ten o'clock a. m. and 4 o'clock p. m. of said day, at which time and place you are requested to attend if you see proper.

[SEAL.] S. P. WOLVERTON,
Pl'ff's Att'y.

Copy.

April 26, 1878.—Service accepted.

WM. H. M. ORAM.
Att'y for Def't.

333 In the Court of Common Pleas of Northumberland County.
Jan'y T., 1874.

IRA T. CLEMENT
vs.
THE NORTHUMBERLAND COAL COMPANY. } No. 394.

Depositions of witnesses taken before James K. Davis, Esq., a notary public, at his office, in the borough of Sunbury, North. county, Pa., on the thirteenth day of May, A. D. 1878, in pursuance of the annexed rule and notice, S. P. Wolverton, Esq., and T. H. Purdy, Esq., appearing for the plaintiff; W. H. M. Oram, Esq., appearing for the def't.

It is hereby agreed that the deposition of John Fisher, a witness produced and sworn on the part of the plaintiff, taken in this case may be read on the trial of the following cases: No-. 103, Nov. 1, 1872; 394, 395, 396, & 397, of January term, 1874, in which cases rules to take testimony are hereto attached the same as if they were taken separately in each case, subject to all objection to the relevancy of the testimony and competency of the witness.

S. P. WOLVERTON,
T. H. PURDY,
Att'ys for Pl'ff.
WM. H. M. ORAM,
Att'y pro Def't.

334 JOHN FISHER produced and sworn on the part of the plaintiff:

By WITNESS: I reside in Shamokin township; lived there since 1812: lived near the line of Columbia county; county line divided the farm I lived upon; I am between 75 and 78 years of age; I was born in 1799; I will be 79 years old next September; my father's name was Henry Fisher; my father never owned any of the Brush Valley lands; I owned the undivided ½ of eight tracts. I was with

Henry Donnell when he run part of these lines, in Aug't or Sept., in 1815 or '16; he run them the same year I carried the mail; it was between 1814 and 1816; I know it was the time I was carrying the mail; I commenced carrying the mail in 1815. We started to survey at that time at the northwest corner of the Daniel Reese survey, in sight of my father house; then ran from there along the top of the mountain eastward to the corner of the Thomas Billington; then we ran south between the Billington and Reynolds south to the stone corner among maple sprouts over near the swamp. At that point we found a stone corner; the timber there is very thin; there was no timber there at that time; it is very open; clear of timber; this is 50 or 60 rods south of the Rockefeller sprouts where we found this stone corner. We started at the Billington corner and ran
335 south on the line between the Billington and Reynolds past the Rockefeller sprouts to a point 50 or 60 rods beyond, where we found the stone corner with the maple sprouts around it, at the north side of the swamp. This corner looked as though it had been piled up there for some time. We found two line trees on this cross-line between the Billington and the Reynolds; one was a hemlock, one a pine. Wm. Leatherland and I were with Henry Donnell at that time; I carried chain; I was well acquainted with Henry Donnell; I knew him for 4 years before this; he boarded at my father's house when he laid out a town for Tilghman; he was a surveyor; when he surveyed in that neighborhood he stopped with my father. He frequently surveyed there; he done a good deal of surveying in that country; he was at that time the principal surveyor of lands there at that time; done most of it; I had a conversation with him at that time about this line.

(Pl'ff propose- to ask the witness what this conversation was he had with Henry Donnel at the time he was surveying these lines in 1815 relative to the location of these tracts of land, this corner, and work done by him previously *by him* 21 or 22 years before, when he located the Brush Valley surveys, to be followed by proof that Henry Donnel is dead, for the purpose—
336 First. As hearsay evidence of the boundary of these tracts and location of their lines.

Second. For the purpose of showing where the southwest corner of the Billington and *and* the southeast corner of the Reynolds were originally located on the ground in 1793.

Def't objects—

First. It is not proposed to show that Henry Donnel was the surveyor who ran the lines in 1793 and who located the lands which the plaintiff calls the Brush Valley lands, and because any statements of Henry Donnel would not be evidence for such purpose.

Second. Because it is not proposed to show that Henry Donnel was present when the lands were located; that the testimony is not competent—hearsay testimony of boundary and not evidence for the purpose offered.

Third. Because it is irrelevant.)

By WITNESS: Mr. Donnel said at that time, while there at that corner, that twenty-one or twenty-two years ago "we located these warrants." When we got to this corner Mr. Donnel said, "Here is the corner," pointing to it.

I saw that corner 100 or 150 times afterward; I cannot say how often. I saw it ten or 15 times every fall for 30 or 40 years afterward, sometimes oftener; for 30 or 40 years I saw it while
337 out hunting and out gathering berries. We could not get through the swamp and was obliged to get around it on this side. I saw it sometimes every day. I hunted here because it was the best hunting ground there was on the mountain; it was more broken up. I hunted deer, generally—any wild game we came across. We had a deer lick at the head of this swamp. There was a pine road led through there; went through there to hunt pine knots. There was an ore road run through there. I passed this corner many times with a horse to take deer home; we went around this corner to strike the old ore road. There is a spring near this corner forms a little run there at the head of the swamp; swamp covers about two acres.

I may have seen this corner before the time I was there with Donnel; I think I have. I have seen this corner oftener than any other corner in the woods.

[At the time Henry Donnel said he located these warrants, 21 or 22 years ago, he was surveying the Brush Valley lands. By the Brush Valley lands I mean the Ira Clement lands.]

My father was agent for these Brush Valley lands, to keep trespassers and shingle-makers off of the lands.

338 From this stone corner we ran west toward the Daniel Reese. We crossed the pike some few rods from the spring; four or five rods from the culvert south of it.

The spring used now is two or two and one-half rods from the culvert and north of the old spring. They both come from the same opening. After we passed that spring we ran west until we crossed the Thompson road to a big water pond; then it was night. Next morning I went off with the mail and my brother went along.

On the next Monday, at noon, I met them and we started at the J. Adam Gilger line and ran east about 100 or 120 rods, crossed Roaring creek, and cornered on the bank at a little ash; then ran west about 40 or 50 rods to a small stone corner and small black oak in it; then went north to the northwest corner of the Daniel Reese, the place of beginning. At the southwest corner of the Daniel Reese, the place of beginning, at the southwest corner of the Reese, we cut out the Gilger interference.

The Daniel Reese as laid down interferes with the Gilger. The Gilger was the oldest warrant. The Gilger interference is in the valley. I know where the Gilger lines are as well as I know where this house stands.

I was with Daniel when he run the Gilger interference. I
339 know the maple and the ash corners.

A day or two after I went along with Daniel again. We started at the northwest corner of the Billington and run east on

the top of Little Mountain to the northeast corner of the Thomas Ruston or Mary Ruston, Jr., one or the other; then ran south across the valley up to the top of Big Mountain in a cove. There was a corner there. It was between the Bear path and the Catawissa path.

The Catawissa path started out of the pike at a little field on top of the mountain. We always called it the Catawissa path.

The little field is on Green Ridge, which lies between Big Mountain & Mt. Carmel Borough. This path run on into Roaring Creek valley northeast from that field, in the direction of Catawissa. It was used for foot travel and horseback travel. It was an old path. The old settlers of Roaring Creek valley said it was a good path when they went there. They called it the Indian path, and, sometimes, Lee's path. We called it Catawissa path. It was there as long as I knew anything. I can recollect it as early as 1810.

The bear path was not as plain; it was traveled by wild animals principally.

It started from Mahanoy and intersected the Catawissa path at the north side of the Big Mountain, in the cove where Don-
340 nel fixed his corner. He fixed it between these two paths, about 20 or 30 rods east of the Catawissa path.

In 1815 it was pretty plain; you could follow it for miles on the mountain.

From the corner in the cove Donnel ran west to the little swamp to the corner at the Billington. That is the corner that I speak of as where we had the conversation.

That was all the surveying we done at that time on the Brush Valley warrants.

I think Donnel went home then, and afterwards went to run the McCall lands.

I was taken there with surveyors to point out this corner—the common corner, southeast corner of the Reynolds and southwest corner of the Billington, at the head of the swamp—the Donnel corner. I pointed it out in a space not larger than this room, but could find no trace of it there then, but pointed the spot out where it had been. I showed them within a spot of 8 or 10 feet. I think W. W. McWilliams, Geo. W. West, H. S. Boyer, and Ira T. Clement were along. When Donnel ran from the corner in the cove and from there to the corner at the head of the swamp and from there to the Reese he was running the southern line of the Brush Valley warrants.

These lands were called the "asylum land" and the "Holland purchase."

X'd by Mr. ORAM:

341 It was in Aug. or Sept. I was on these lands. I never was on — more than once. Wm. Leatherland was with us; he helped carry chain and kept Donnel's notes.

I was born in 1799, 20 day of Sept. I don't know how old I am rightly. I know I am in my 78 year. I was carrying chain

for Mr. Donnel. We started at the northwest corner of the Daniel Reese. I know it was the Reese. Donnel had his papers, and I owned the ½ of those eight tracts.

We run from that corner east on top of the Little Mountain. We ran up to the Billington tract, then ran across to the little swamp some 300 or 350 rods across; found two line trees near the creek—a pine and hemlock.

I saw them many, many times after Donnel marked them.

Donnel did not block them; he did not block any trees.

I cannot tell what the course is from the corner of the Billington over to the swamp. I don't remember about the degrees, &c.

At the swamp we found a stone corner—stone piled up. [All Donnel said was "This is the corner; here is where we located these warrants 21 or 22 years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was that line. I knew it was that line.]

That swamp is 50 or 60 rods from Rockefeller's corner; it is between 40 and 60 rods.

342 I owned the undivided ½ of eight surveys. Of these surveys I knew where the southern boundary was. I might have said I did not know where the southern boundary was. I don't know any southern boundary only the one Donnel run.

I had not sold yet when Rockefeller made the survey for Bellas.

I knew there was a southern boundary, only the Donnel line, and Rockefeller run one. I might have said I did not exactly know where the southern line was. Rockefeller run one, which he said was right, and Donnel had run one, which he had said was right.

There was a stone corner there and maple sprouts. The timber was very scarce there, right where this corner was. From this corner we run west, across the pike, to a point 4 or 5 rods south of the culvert; then run across the Thompson road to a water pond; from there we went home. The next day was Friday, and I went to carry the mail. My brother went then in my place.

I have been over the line between the Reynolds and Billington since that time. I was on the line from the swamp to the top of the Little Mountain and back again. W. W. McWilliams, Geo. W. West, Ira T. Clement, and a couple of surveyors was with me that I did not know. This party sent for me to go with them. I may say that I passed that corner 150 times after I was there

343 with Donnel. It was in my way there where I hunted every season. I passed and repassed 30 or 40 times every season, hunting there. I have killed deer there since 1850.

In chief:

Do you think the sprouts had in court ever sustained a tree?

Answer. I have seen the David Rockefeller sprouts in court. I do not think they ever sustained a tree, only a stool.

Mr. Oran objects to this last question and answer—

First. Because the question is leading.

Second. Because the witness could not possibly have had any knowledge of the fact about which he is questioned.

Third. Because it is a fact to be found by the jury and because the answer is a mere conjecture and not evidence of an existing fact.

By WITNESS: I have had a good deal of experience in woodcraft. These mountains burn over about once in three years. They burn over as soon as leaves collect.

These sprouts exhibited in court were sprouts that spring up there after a fire had gone over. After a fire has burned over maple sprouts they grow up again and form what is called a stool. I would call these sprouts a stool.

On the north side of a dry mountain it is difficult to find a maple tree. They require wetter ground.

I don't believe you can find another stool about there. They require wetter ground.

344 There are plenty at the swamp.

The ground is wet about the swamp.

Swamp covers about 2 or 3 acres; northwest corner of the Daniel Reese is at the point of the mountain.

The Donnel lines 3 or 4 rods south of the Red house.

X'd X'd:

Maple stools spring from maple roots.

There are not always roots where there are stools that were originally a large tree.

I saw these roots in court. They never sustained a tree. This one they had in court only had two roots; there may be some little roots. Stools sometimes form from where the trees burn down. When a tree burns down it sometimes sprouts. I hardly think when a tree burns down that it afterwards grows much. I don't think a maple stool would last for twenty years anywhere

JOHN FISHER.

Sworn and subscribed before me this thirteenth day of May, A. D. 1878. Witness my hand and notarial seal.

[NOTARIAL SEAL.] JAMES K. DAVIS, JR.,
Notary Public.

I hereby certify that the above witness, John Fisher, was duly qualified and examined at the time and place stated in the above caption, in my presence, and that the testimony is as fully and correctly reported as was given.

345 Witness my hand and seal this 13th day of May, 1878.

[NOTARIAL SEAL.] JAMES K. DAVIS, JR.,
Notary Public.

Endorsed: No. 394. January term, 1874. Ira T. Clements *vs.* The Northumberland Coal Company. Depositions, June 12, 1878, filed.

Costs:

J. K. Davis, N. P. fees,		$7 00
John Fisher, witness, one day	1 50	
22 miles	1 42	
		2 92
		$9 92

NORTHUMBERLAND COUNTY, *ss:*

I, Lloyd T. Rohrbach, prothonotary of the court of common pleas, of the county of Northumberland, in the Commonwealth of Pennsylvania, do certify that the above and foregoing fourteen pages and five pages or rules for depositions contain a true and correct transcript and copy of the deposition of John Fisher, taken under and in pursuance of said rules, in the cases therein stated, so full and entire as the same remains of record and among the files of my said office at Sunbury, Pa.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, in Sunbury, this 26th day July, A. D. 1878.

[SEAL.] LLOYD T. ROHRBACH,
Prothonotary.

Indorsed: Deposition of John Fisher, Ira T. Clement.

346 4 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1886.

ELISHA A. PACKER *vs.* IRA T. CLEMENT. } No. 19.

Upon the trial of the issue in this case between the said parties before a jury duly empaneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the defendant, to maintain the issue on the part of the defendant, made the following offer of testimony:

"Defendant's counsel propose to prove by general reputation among surveyors who are acquainted with the lands in the vicinity of the Brush Valley block and in that neighborhood that Henry Donnel was assistant under the party who made the survey and who was reputed to have surveyed the lines in Shamokin township, Northumberland county, in 1793 and 1794, to be followed by the testimony of John Fisher, as contained in his deposition, that he, Fisher, assisted Henry Donnel to survey the lands in dispute in 1814 and 1815, and while actually engaged in the survey, when at the
347 south end of the line between the Billington and the Reynolds, that Donnel said at that time, in connection with his running these surveys and when actually engaged thereon, that

21 or 22 years ago we located these lines, and that Mr. Donnel said 'This is the corner,' pointing to the corner as claimed by the defendant."

And prayed the court leave that the same might be given in evidence to said jurors.

To which the counsel for the plaintiff objected as follows:

"Objected to by plaintiff's counsel for the reason stated in the offer next preceding, and for the additional reason that it is incompetent and irrelevant."

Objections to preceding offer:

"Counsel for plaintiff objects to the paper offered as the deposition, which purports to be a deposition taken under an agreement between counsel to read, to be read upon the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and The Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of this court; that the several cases referred to in the deposition have been tried and finally disposed of, and that this deposition was never
348 read at any of the trials, and it was never competent to meet it under the rules of court, John Fisher being at the time living and able to attend court, and did attend court, and his testimony was taken in those trials and printed in the paper books from which the testimony of deceased witnesses have been read on this trial; and further objects for the reason that it was taken between other parties, and that he is neither privy -or party to the suit in which the deposition was taken, and that he claims by title derived at sheriff's sale—a legal process—a portion or all of the property that was claimed by the Northumberland Coal Company, the party to the former action; and, further, that the deposition upon its face shows that the declarations, which are offered to be proven by the deposition, *was* not part of the *res gesta*, and were not made by a person in the performance of any official act, and not made by him in the performance of any act to which the declarations relate, but they were of past matter, of which there is no evidence that the declarant had any knowledge.

"Pl'ff further objects that the declarations referred to in the
349 deposition were made by a party not while he was doing an act of which the declarations might be explanatory, but of a past act, of which there is no evidence the declarant had any knowledge other than his own declaration."

The court sustained the objections and rejected the evidence; to which the counsel for the defendant excepted and prayed the court to seal this bill of exceptions, which is done accordingly Dec. 17th, 1883.

W. W. ACHESON. [SEAL.]

350 5 *Excp.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon a trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"The William Elliott is one of a block of surveys of *of* the date of October 21st and 22d, 1794, embracing what are now known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands; the call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds.

There is no controversy as to the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans, and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793.

The William Elliott, calling on the south for these last-named surveys and on the north for the Daniel Reese, Charlotte
351 Ruston, Mary Myers, and John Reynolds, rightfully embraces all the land within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for by the William Elliott may be, to that line must it go."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judges, at the request of the said counsel for the said defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

352 6 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon a trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the said court charged the jury as (*inter alia*) follows:

"The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances, or from a certain alleged maple corner on the south—the same practical result for the purposes of this case being reached by whichever of these two methods the location is effected.

The location upon which the defendant insists involves a wide departure from the official returns of survey. For example, the official length of the eastern line of the Samuel Lobdell is 320 rods.

353 The defendant's location lengthens this line 32 rods, thus carrying the southern line of the block at its eastern end that much further south. At the division line between John Reynolds and Thomas Billington the defendant's location places the southern line of the block 61 rods south of the official distance, measuring from the north line. The official length of the western line of the Daniel Reese is 340 rods. The defendant's location, however, gives this line 426 rods, or an increase of 86 rods, thus carrying the southern line of the block at its western end that much further south.

If the true southern line of the Brush Valley block is where the defendant locates it, the land in controversy belongs to that block, and is covered by the Charlotte Ruston and Mary Myers.

On the other hand, if the southern line of the block is where the plaintiff contends, the land in controversy is outside of that block and within the lines of the William Elliott."

And thereupon the counsel for the said defendant did then and — except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

354 The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge-, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

355 7 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1884.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon a trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"The plaintiff has brought into court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block. A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state that they find no old axe mark on this exhibit and no evidence of any.

Several of these witnesses testify that they saw this gum when standing and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evi-
dence of any ancient axe mark. In the midst of this con-
356 flicting testimony, which is well calculated to excite at least a doubt, both as to the existence of an ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the defendant's surveyors took from the tree *it* would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter.

But the defendant has not produced it, nor has he given any evidence explanatory of its absence. This block was taken out as late as January last, and was in the possession or under the control of the defendant. The withholding it, then, in the view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree.

The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793. One of these is a chestnut oak at 140 rods westwardly from the southeast corner of the Samuel Lobdell, which tree was discovered and blocked by A. J. Guffey, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffey, Mr. West, and Mr. Boyer testify counted back to 1793. T. W. Moore,
however, one of the defendant's surveyors, says he cannot
357 say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands. A. K. White, a surveyor, testifies that he counted this block at Lock Haven at a previous trial, and that it counted but

82 years, which would make it too young by four years for the survey of 1793. To the like effect is the testimony of Geo. B. Strauch and Robert Ammerman, surveyors, whose testimony at the trial at Lock Haven has been read in this case. William T. Mitchell also counted the block at the Lock Haven trial, and he testifies that it counted but 82 years. Here, then, is a direct conflict between the expert witnesses who have examined the block from the chestnut oak, and the greater number testify that the count fell short of the survey of 1793 by four years. The block itself, which, in connection with expert testimony, might have aided you essentially as well in correctly determining whether it bore an ancient axe mark at all (which is seriously disputed) as in solving the controverted question of age, has not been produced by the defendant nor its absence accounted for. The evidence traces the block into the defendant's possession; it was used by him as an exhibit at the Lock Haven trial, and it was there called in question as it is here. Why is it now absent, when it so vitally affects the case?"

358 And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29 day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

359 8 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Honorable William McKennan and Honorable M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"We now direct your attention to another branch of the case. There lies to the east of the Samuel Lobdell and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant issued January 22, 1794, and the survey thereon, according to the official return, was made on the 23d of

February of that year. It was, it would seem, returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later.

"The Richard Martin therefore is a survey junior to the Samuel Lobdell and its fellow-surveys. It is true the defendant's
360 surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and the other warrants of the Brush Valley batch, but in the face of the official returns this opinion is entirely worthless. In the nature of the case, it is a matter of pure speculation on the part of these surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years."

And thereupon the counsel for said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seals of the said judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

361 9 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania, November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Honorable William McKennan and Honorable M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"The Richard Martin calls on the east for the Francis West, a survey of September 10, 1793, and these two surveys have a common south corner, viz., 'a post by a pine;' but in order to reach that corner it is necessary to extend the eastern line of the Richard Mar-

tin southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty (250) rods, whereas the actual length is two hundred and eighty-two (282) rods. The south line of the Richard Martin, running from the post by the pine, is north eighty-nine and three-quarters (89¾) degrees west three hundred and eight (308) perches to a post. There is evidence tending to show that for the
362 distance of one hundred and fifty perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is three hundred and twenty (320) rods long, the same as the Lobdell's east line.

Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell and thirty-(32) rods further south than the deputy surveyor thought it was, as is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner thirty-two rods (32) south of the southeast corner of the Samuel Lobdell, as defined by William Gray's official return; and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole
363 Lobdell tract about (32) thirty-two rods further south than its official return locates it, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be eighty-six (86) rods.

To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin. Hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury, in connection with all the other evidence, in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of these trees were marked for the survey of 1793, then the Richard
364 Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line

according to the official courses and distances (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner)."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

365 10 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"We now direct your attention to another branch of the case. There lies to the east of the Samuel Lobdell and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant, issued January 22d, 1794, and the survey thereon, according to the official return, was made on the 23d of February of that year. It was, it would seem, returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later. The Richard Martin, therefore, is a survey junior to the Samuel Lobdell and its fellow-surveys. It is true the
366 defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and other warrants of the Brush Valley batch, but in the face of the official returns this opinion is entirely worthless. In the nature of the case it is a matter of pure speculation on the part of the surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them

after the lapse of ninety years. The Richard Martin calls on the east for the Francis West, a survey of September 10th, 1793, and these two surveys have a common south corner, viz., a post by a pine; but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is 250 rods, whereas the actual length is 282 rods. The south line of the Richard Martin, running from the post by the pine, is north 89¾ degrees west 308 perches to a post.

There is evidence tending to show that for a distance of about 150 perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that
367 point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is 320 rods long, the same as the Lobdell east line. Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell, and 32 rods further south than the deputy surveyor supposed it was, as is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner 32 rods south of the southeast corner of the Samuel Lobdell as defined by William Gray's official return, and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about 32 rods further south than its official return locates it, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley
368 block and extend every survey thereof south of the official distance as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be 86 rods. To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin. Hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury, in connection with all the other evidence, in determining the question whether or not the chestnut oak and the gums relied on by the defendants are trees marked by the surveyors in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their

fixed corners upon the northern line according to the official
369 courses and distances (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner)."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute made and provided.

And thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

370 11 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the said court charged the jury (*inter alia*) as follows:

"Third. But should the evidence fail to satisfy the jury that the said chestnut oak and gums or any of them are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern line of the block by running out the courses and distances as shown by the official returns of survey, and the verdict must be for the plaintiff."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to
371 do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the charge of the said court, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid

statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

372 12 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Honorable William McKennan and Honorable M. W. Acheson, the counsel for the said plaintiff requested the court to charge the jury as follows:

"2nd. That in the absence of marks upon the ground indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances as shown by the official return of survey and cannot be extended to the south beyond their official distances."

To which point the court gave the following answer and direction to the jury:

"2nd point. This point is affirmed."

And thereupon the counsel for the said defendant did then
373 and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such — made and provided.

And thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

374 13 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said

court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the said plaintiff requested the court to charge the jury as follows:

"5th. It being proved and not disputed in this case that the northern line of the Brush Valley surveys is well marked on the ground and the corners of said surveys designated by the original mark definitely fix the location of each individual survey in the batch, that in the absence of marks to fix definitely the southern boundary of the survey of the said batch must be located from the northern line by running out courses and distances of said surveys according to the official returns of William Gray."

To which point the court gave the following answer and direction to the jury:

"5th point. This point is affirmed."

And thereupon the counsel for the said defendant did then
375 and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the said judges aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

376 14 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Honorable William McKennan and Hon. M. W. Acheson, the counsel for the said plaintiff requested the court to charge the jury as follows:

"11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jesse Brooks, and other older surveys on the south, and calls to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds on the north; that in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor the William Elliott must go to its calls for adjoinders on the north; that as there as no evidence of any such original marks the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Rus-

ton, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston, according to the official courses and distances, from their
377 northern line or from the Rockefeller maple corner."

To which point the court gave the following answer and direction to the jury:

"11th point. This point is affirmed."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the charge of the said court, and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

378 15 *Exc.*

In the Circuit Court of the United States in and for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the said defendant requested the court to charge the jury as follows:

"5th. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor, and in endeavoring to ascertain the proper location the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believes that the said two surveys which call for the Lobdell was located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdell, such fact wonld be of importance in ascertaining the exact location of the Lobdell and of the block of surveys of which it is a part."

379 To which point the court gave the following answer and direction to the jury:

"5th point. The jury may take into consideration the acts of the deputy surveyor, mentioned in this point, in determining the question whether or not the chestnut oak and the gums are trees

marked by the surveyor in 1793 (as the defendant claims) to define the southern line of the block of eleven surveys—the Brush Valley block; but should the jury find that none of these trees were marked for the survey of 1793, then the facts upon which this point is based would be of no importance in determining the controversy in this case."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the charge of the said court, and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

380 16 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

E. A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empannelled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the said defendant requested the court to charge the jury as follows:

"7th. If the jury believe that the William Elliott is one of a block of surveys known as the Lefevre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks or monuments corresponding with the date of survey of this block on the northern line of any one of these surveys would be monuments for the northern line of the William Elliott survey and establish the northern line of the William Elliott."

To which point the court gave the following answer and direction to the jury:

"7th point. This point, as a whole, is refused. The William Elliott calls on the north for the Charlotte Ruston and Mary Myers and other members of the Brush Valley block, and no marks on the ground have been found to limit that call. Moreover, the
381 official return of the Lewis Walker survey, one of the Le Fevre block which adjoins the William Elliott on the east, adopts the Reynolds-Billington maple as a northern monument for

the Walker. As we have already instructed the jury in our general charge, wherever the true line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

382 17 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER *vs.* IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the said defendant requested the court to charge the jury as follows:

"8th. If the jury believe the testimony of the defendant's surveyors that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established, and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that corner would be monuments fixing the whole northern line of the Le Fevre block, and a line run westward from the post by a pine corner by the official courses and distances of the northern line of the said block by these trees would establish the northern line of the William Elliott survey."

To which point the court gave the following answer and direction to the jury:

383 & 384 "8th point. This point is refused."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record the said counsel for the said defendant did then and there tender this bill of exceptions to the

charge of the said court and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

385 18 *Exc.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this cause between the said parties before a jury duly empanneled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the counsel for the said defendant requested the court to charge the jury as follows:

"10th. That any monument on the ground called for or adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and in the present case if the jury believe that any part of the southern line of the block of eleven, or Brush Valley block, was run by the deputy surveyor either from or to intersect the post by a pine as a mark indicating the location of the said southern line, the said post by a pine would be a monument which would control the mere evidence of official distances."

To which point the court gave the following answer and direction to the jury:

386 "10th point. As a naked proposition this point is correct, and it is affirmed; but the jury will understand from our general charge that if they find that the chestnut oak and gums upon which the defendant relies are not trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block, the post by the pine would have no control in the location of that block."

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record the said counsel for the said defendant did then and there tender this bill of exceptions to the charge of the said court and requested the seals of the judges aforesaid should be put to the same according to the form of the statute in such case made and provided. And thereupon the said judges, at the request of the said counsel for the defendant, did put their seals to this bill of excep-

tions, pursuant to the aforesaid statute in such case made and provided, this 29th day of December, A. D. 1883.

M. W. ACHESON. [SEAL.]

387 *Petition for Writ of Error.*

THE UNITED STATES OF AMERICA,
Western District of Pennsylvania:

To the honorable judges of the Supreme Court of the United States:

And now comes Ira T. Clement, of Sunbury, Northumberland county, Pennsylvania, by S. P. Wolverton, his attorney, and complains that in the records and proceedings, and also in the rendition of the judgment in a suit between Elisha A. Packer, plaintiff, and the said Ira T. Clement, defendant, tried in the circuit court of the United States for said western district, at November term thereof, A. D. 1883, and in which judgment was rendered against him on the third day of January, A. D. 1884, manifest error hath intervened, to the great damage of the said Ira T. Clement; wherefore he prays for allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

S. P. WOLVERTON.

Indorsed: No. 19. Nov'r T., 1881. Elisha A. Packer *vs.* Ira T. Clement. Petition for writ of error. Filed January 18, 1884.

388 *Bond for Writ of Error.*

Know all men by these presents that we, Ira T. Clement, Henry Clement, and J. Weiser Bucher, are held and firmly bound unto Elisha A. Packer in the full and just sum of five hundred dollars ($500), to be paid to the said Elisha A. Packer, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a circuit court in Pittsburgh, for the western district of Pennsylvania, in a suit depending in said court between Elisha A. Packer, plaintiff, and Ira T. Clement, defendant, ejectment for the recovery of a piece of land in Mount Carmel township, North'n Co., Pa., was rendered against the said Ira T. Clement, and the said Ira T. Clement having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Elisha A. Packer citing and admonishing him to be and appear at
389 a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Ira T. Clement shall prosecute his writ of error to effect and answer all costs, if any, or fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

IRA T. CLEMENT. [SEAL.]
HENRY CLEMENT. [SEAL.]
J. WEISER BUCHER. [SEAL.]

Approved by—
WM. A. SOBER,
U. S. Com'r Circuit Court U. S. in & for Western District of Penna.

Indorsed: No. 19. Nov'r T., 1881. Elisha A. Packer *vs.* Ira T. Clement. Bond for writ of error..

Jan. 18, 1884.—The within bond approved.
M. W. ACHESON, *U. S. Judge.*

390 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Elisha A. Packer, a citizen of the State of New York, plaintiff, and Ira T. Clement, a citizen of the State of Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of January, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE, *Cl'k.*

Allowed by—
M. W. ACHESON,
U. S. Judge.

391 [Endorsed:] No. —. —— term, 18—. Ira T. Clements, pl'ff in error, def't below, *vs.* Elisha A. Packer, def't in error, pl'ff below. Writ of error. E. Allowed and filed January 18, 1884. H. D. Gamble, cl'k.

392 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Elisha A. Packer, a citizen of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 2nd Monday of October, 1884, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein Ira T. Clement, a citizen of the State of Pennsylvania, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 4 day of October, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penna.]

M. W. ACHESON,
Judge of U. S. District Court, Presiding in the Circuit Court.

Oct. 6th, 1884.—I hereby accept service of above citation.
JAMES RYON,
Of Counsel for E. A. Packer.

[Endorsed:] No. —. —— term, 18—. —— —— *vs.* —— ——. Citation.

393 WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov. Term, 1881.

ELISHA A. PACKER } No. 19.
vs.
IRA T. CLEMENT. }

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 8th day of October, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, judge of the United States district court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate and is now, clerk

of the said circuit court, and that the said certificate made by him is in due form of law.

Pittsburgh, October 8, 1884.

M. W. ACHESON,
Presiding in the U. S. Circuit Court.

[Endorsed:] No. —. —— term, 18—. —— —— *vs.* —— ——.

394 1 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court the counsel for the said defendant, Ira T. Clement, to maintain the issue in the part of the defendant, made the following offer of testimony:

"The counsel for the defendant offer in evidence a certain book from the commissioner's office of Northumberland county endorsed, '1796. Returns of the deputy surveyor for the townships of Augusta, Catawissa, Shamokin, and Mahanoy by William Gray,' and endorsed at the head, 'This calculation is made in conformity with the county levy law of 1795,' and to read the following entries therefrom:

No.	Name warrantee.	Present owner.	Situation & remarks.	Acres.	
219	Richard Martin	Dr. Thomas Ruston*	Adjoining Francis West on waters of Roaring creek	419¾	$293 78
220	Samuel Lobdell	do.*	Adjoining the above do.	411	205 50
221	Joshua Bean	do.*	do. do.	429¾	215 78
222	John Young	do.*	do. do.	406¼	203 00
223	Mary Ruston, Jr.	do.*	do. do.	380¼	190 00
224	Thomas Ruston	do.*	do. do.	418½	209 00
225	Mary Ruston	do.*	do. do.	434½	217 00
226	Thomas Billington	do.*	do. do.	411	205 00
227	John Reynolds	do.*	do. do.	444½	222 25
228	Mary Myers	do.*	do. do.	443½	221 75
229	Charlotte Ruston	do.*	do. do.	426¾	213 50
230	Daniel Reese	do.*	do. do.	386¼	193 00

* Now asylum company.

396 "And the following certificate to the return:

'GENTLEMEN: I have made this return as exact as it was in my power from the papers in my hands, and am, gentlemen, with respect,

Your humble servant,

WILLIAM GRAY, *Surveyor.*'

"Directed to Richard Daring, Henry Vanderslice, and Nathan Hartman, commissioners.

"To show—1st, that these lands were returned for the purpose of taxation in accordance with the act of Assembly of 1795, requiring returns by the deputy surveyor of the county.

"2nd. For the purpose of showing that they were returned as a block owned by the same party, by the deputy surveyor, who reports three years before to have located these surveys upon the ground as evidence to show not only that the eleven, but that the Richard Martin survey was part of the block with the eleven lying west of it and called the Brush Valley block, and was so considered by the surveyor who located them on the ground.

"3rd. For the purpose of showing the official acts and declarations of William Gray, the deputy surveyor, with reference to these surveys, and for the purpose of showing their return for the purpose of taxation.

"To be followed by a treasurer's sale of said land."

To which the plaintiff's counsel objected as follows:

"Objected to by counsel for plaintiff for the purposes stated in the offer upon the ground that the return of the deputy surveyor under the act of Assembly is only for the purpose of taxation, and that it has no tendency to prove and does not by his declarations, or make evidence of a block of surveys so as to embrace the Richard
397 Martin, a survey of 1794, a portion of a block of surveys made in 1793. Further object to the return, so far as it relates to the ownership of the property for the warrants returned, on the ground that the deputy was incompetent to establish the ownership of the surveys returned; do not object to the book if confined to the purpose stated in the offer of showing the fact of the return by the deputy surveyor of these surveys for the purpose of taxation.

"Counsel for plaintiff further objects that the purpose stated in the offer is immaterial and irrelevant. The deputy surveyors, as directed by the act of Assembly, make returns of all warrants executed by them in their respective districts to the county commissioners, the object of which return was to enable the commissioners to charge the land with taxes. The returns of William Gray, to which reference is made, show that he executed between seven and eight hundred warrants and made returns of the same to the county commissioners. The offer contains no proposition to show that these lands were taxed and taxes paid by any person claiming the lands under whom the defendant claims. It contains no offer to show that the lands were taxed and sold and title acquired by such sale by the defendant or by any one under whom he claims. For any other

purpose, therefore, than the purpose of showing the assessment or payment of taxes and the assessment and sale of lands, the evidence would be irrelevant and immaterial in this case and incompetent. The declaration of a deceased surveyor while doing an act may be evidence in the nature of hearsay, but the declarations of a deputy surveyor three years after he has completed and forwarded his return as to the survey and location of a tract of land or a number of tracts of land would not be evidence, either as hearsay or otherwise. Further, the declarations of a deputy surveyor in making return for the purpose of taxation could not be evidence of boundary or location. Object further to that portion of the offer which states the defendant proposes to follow it by a treasurer's sale of the land as indefinite, as not containing any proposition or offer to follow it with any sale within forty years after that return was made, and that this return was not an assessment, the deputy surveyor not being a taxing officer."

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The court sustained the objections and rejected the evidence and made the following ruling:

The COURT: "We are of opinion that the evidence embraced in this offer is inadmissable on the question of location, and that it is not admissable in any aspect of the case unless the defendant proposes to connect the return of the deputy surveyor with the subsequent tax sale under which the defendant claims."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error

399

2 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T.

Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court the counsel for the said defendant, to maintain the issue on the part of the said defendant, made the following offer of evidence:

"Counsel for defendant offer in evidence the patents to Peter Graul for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham survey, being the Le Fevre block, William Elliott dated the 13th of April, 1797; the Lewis Walker, the 12th of April, 1797; the Nathaniel Brown, the 13th day of April, 1797; the Ebenezer Branham, the 17th day of April, 1797, and the William Shannon, the 13th day of April, 1797, for the purpose of location and showing that the Commonwealth confirmed the location of the said surveys as a block by granting patents to one of them, and also for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys," and prayed the court that the same might be read and given in evidence to the said jurors; to which the counsel for the plaintiff objected as follows:

400 "Counsel for the plaintiff object upon the ground that he claims under Dr. Ruston, who, by virtue of the payment of the purchase-money for several tracts of land, known as the Le Fevre lands, was the owner thereof; that his title gained with the inception of the parts from the Commonwealth location of lands upon the ground in 1793; the patent or patents appeared to have been issued to a stranger and show no connection between himself and the warrantee or Dr. Ruston, and therefore the patent is not evidence as against Dr. Ruston or those claiming under him for any purpose whatever. The patent is not evidence upon the subject of location in any event, the question of location vesting in the evidence in connection with the official survey itself. The patent is a completion of the title above and not necessarily part of the last, and definitely fixes the quantity of land intended to be conveyed by the Commonwealth when such land is granted either to the warrantee or the party holding the right, title, and interest to the patent."

The court sustained the exceptions and rejected the evidence.

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said ruling and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

401 3 *Ex.*

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

ELISHA A. PACKER
vs.
IRA T. CLEMENT. } No. 19.

Ejectment.

Upon the trial of the issue in this case between the said parties before a jury duly empanelled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the defendant, by his counsel, made the following offer in evidence:

"Counsel for defendant offer in evidence deposition of John Fisher, taken on rules to take depositions in cases numbered 394, 395, 396, and 397, of January term, 1874, in the common pleas of Northumberland county, and 103, of November term, 1872, of the same county, and agreed to be read in all the cases, subject to exceptions as to incompetency (*pro ut* deposition hereto attached and made part of this bill), it being admitted by both parties that John Fisher is dead," and prayed that the same might be given and read in evidence to the said jury; to which the counsel for the plaintiff objected as follows:

Counsel for plaintiff object to the paper offered as the deposition which purports to be a deposition taken under an agreement
402 between counsel to be read on the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and the Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of the court; that the several cases referred to in deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials and it was never competent to meet it under the rules of court, John Fisher being at the time living and able to attend court and did attend court, and his testimony was taken in those trials and it was printed in the proper books, from which the testimony of deceased witnesses have been read in the trial of this case.

And plaintiff further objects for the reason that it was taken between other parties, and that he is neither privey nor party to the suit in which the deposition was taken, and that he claimed, by title derived at sheriff's sale, a legal process, a portion of all the property that was claimed by the Northumberland Coal Company, the party to the former action.

And, further, that the deposition on its face shows that the declarations which are offered to be proven by the deposition were not a part of any *res gesta* and were not made by a person when
403 in the performance of any official act and not made by him in the performance of any act to which the declarations

relate, but they were of past matter of which there is no evidence that the declarant had any knowledge.

Plaintiff further objects that the declarations referred to in the deposition were made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act of which there is no evidence of which the declarant had any knowledge other than his own declaration.

"It is admitted that the deposition of John Fisher, filed in the court of common pleas of Northumberland county, of No. 394, of January term, 1874, in the case of Ira T. Clement *vs.* The Northumberland Coal Company, of June 12, 1878, *that it* was taken May 13, 1878, after the verdict of the jury in that case and after the witnesses had testified at the trial of the case."

Deposition.

JOHN FISHER produced and sworn on the part of the plaintiff:

By WITNESS: I reside in Shamokin township; lived there since 1812; lived near the line of Columbia county; line divided the farm I lived upon. I am between 75 and 78 years of age. I was born in 1799. I will be 79 years old next September. My
404 father's name was Henry Fisher. My father never owned any of the Brush Valley lands. I owned the undivided ½ of eight tracts. I was with Henry Donnel when he run part of these lines, in Aug. or Sept., in 1815 or '16. He run them the same year I carried the mail. It was between 1814 and 1816. I know it was the time I was carrying the mail. I commenced carrying mail in 1815. He started to survey at that time at the northwest corner of the Daniel Reese survey, in sight of my father's house. Then ran from there along the top of the mountain eastward to the corner of the Thomas Billington. Then we ran south between the Billington and Reynolds south to the stone corner among maple sprouts over near the swamp. At that point we found a stone corner. The timber there is very thin. There was no timber there at that time. It is very open; clear of timber. This is 50 or 60 rods south of Rockefeller's sprouts, where we found this stone corner. He started at the Billington corner and run south on the line between the Billington and Reynolds, past the Rockefeller sprouts to a point 50 or 60 rods beyond where we found the stone corner with the maple sprouts around, at the north side of a swamp. This corner looked as
405 though it had been filled up there for some time We found two line trees on this cross-line between the Billington and the Reynolds; one was a hemlock; one a pine. Wm. Leatherland and I were with Henry Donnel at that time. I carried chain. I was well acquainted with Henry Donnel. I knew him for 4 years before this. He boarded at my father's when he laid out a town for Tilghman. He was a surveyor. When he surveyed in that neighborhood he stopped with my father. He frequently surveyed there. He done a good deal of surveying in that country. He was at that time the principle surveyor of lands—done most of it. I had a conversation with him at that time about this line.

Plaintiff proposes to ask the question what the conversation was he had with Henry Donnel at the time he was surveying these lines in 1815 relative to the location of these tracts of land—this corner—and work done by him, personally by him, 21 or 22 years before when he located the Brush Valley surveys, to be followed by proof that Henry Donnel is dead.

For the purpose—

First. As hearsay evidence of the boundary of these tracts and location of their lines.

Second. For the purpose of showing where the southwest
406 corner of the Billington and the southeast corner of the Reynolds were originally located on the ground in 1793.

Def'ts object—

First. It is not proposed to show that Henry Donnel was the surveyor who run the lines in 1793 and who located the lands which the plaintiff calls the Brush Valley lands, and because any statements by Henry Donnel would not be evidence for such purpose.

Second. Because it is not proposed to show that Henry Donnel was present when the lands were located; that the testimony is not competent hearsay testimony of boundary, and not evidence for the purpose offered.

Third. Because it is irrelevant.

By WITNESS: Mr. Donnel said at that time, while there at that corner, that 21 or 22 years ago "we located these warrants." When we got to this corner Mr. Donnel said, "Here is the corner," pointing to it. I saw that corner 100 or 150 times afterwards. I cannot say how often. I saw it 10 or 15 times every fall for 30 or 40 years. I saw it while out hunting and out gathering berries. We could not get through the swamp, and was obliged to get around it
407 on this side. I saw it sometimes every day. I hunted there because it was the best hunting ground there was on the mountain; it was more broken up. I hunted deer generally—any wild game we came across. We had a deer lick at the head of this swamp. There was a pine road led through there; went through there to hunt pine knots. There was an ore road run through there. I passed this corner many times with a horse to take deer home; we went around this corner to strike the old ore road. There is a spring near this corner—forms a little run there at the head of the swamp; swamp covers about two acres. I may have seen this corner before the time I was there with Donnel. I think I have seen this corner oftener than any other corner in the wood. At the time Henry Donnel said he located these warrants, 21 or 22 years ago, he was surveying the Brush Valley lands. By the Brush Valley lands I mean the Ira T. Clement lands. My father was agent for these Brush Valley lands to keep trespassers and shingle-makers off of the lands. From this stone corner we ran west toward the Daniel Reese. We crossed the pike some few rods from the spring,
408 four or five rods from the culvert, south of it. The spring used now is two or two and one-half rods from the culvert and north of the old spring; they both came from the same opening. After we passed that spring we ran west until we crossed the Thomp-

son road to a big water pond; then it was night. Next morning I went off with the mail and my brother went along. On the next Monday, at noon, I met them, and we started at the J. Adam Gilger line and run east some 40 or 50 rods; then run north 100 or 120 rods, crossed Roaring creek and cornered on the bank at a little ash; then run west about 40 or 50 rods to a small stone corner and small black oak in it; then went north to the northwest corner of the Dan Reese, the place of beginning; at the southwest corner of the Reese we cut out the Gilger interference. The Daniel Reese, as laid down, interferes with the Gilger; the Gilger was the oldest warrant. The Gilger interference is in the valley. I know where the Gilger lines are as well as I know where this house stands. I was with Donnel when he run the Gilger interferrence. I know the maple and the ash corners. A day or two after I went along with Donnel again. We started at the northwest corner of the Billington and ran east on
409 the top of Little Mountain to the northeast corner of the Thomas Ruston or Mary Ruston, Jr., one or the other; then ran south across the valley up to the top of Big Mountain, in a cove. There was a corner there; it was between the bear path and the Catawissa path. The Catawissa path started out of the pike at the little field on top of the mountain; we always called it the Catawissa path.

The little field is on Green Ridge, which lies between Big Mountain and Mount Carmel borough. This path run on into Roaring Creek valley, northeast from that field, in the direction of Catawissa; it was used for foot travel and horseback travel; it was an old path. The old settlers of Roaring Creek valley said it was a good path when they went there; they called it the Indian path and sometimes Lee's path; we called it Catawissa path; it was there as long as I knew anything; I can recollect it as early as 1810.

The bear path was not as plain; it was travelled by wild animals principally; it started at Mahanoy and intersected the Catawissa path at the north side of Big Mountain, in the cove where Donnel fixed his corner; he fixed it between these two paths, about 20 or 30 rods east of the Catawissa path. In 1815 it was
410 pretty plain; you could follow it for miles on the mountain.

From the corner in the cove Donnel run west to the little swamp to the the corner of the Billington. That is the corner that I speak of as where we had the conversation. That was all the surveying we done at that time on the Brush Valley warrants. I think Donnel went home then, and afterwards went to run the McCall lands. I was taken there with surveyors to point out this corner—the common corner, southeast corner of the Reynolds and southwest corner of the Billington, at the head of the swamp—the Donnel corner. I pointed it out in a space not larger than this room, but could find no trace of it there then, but pointed the spot out where it had been. I showed them within a spot of eight or ten feet. I think W. W. McWilliams, George W. West, H. S. Boyer, and Ira. T. Clement were along. When Donnel ran from the corner in the cove and from there to the corner at the head of the swamp and

from there to the Reese he was ru nning the southern line of the Brush Valley warrants.

These lands were called the "asylum lands" and the "Holland purchase."

X by Mr. ORAM:

It was in Aug. or Sept., 1815, I was on these lands. I was never on more than once. Wm. Leatherland was with us; he
411 helped carry chain and kept Donnel's notes. I was born in 1799, 20th day Sept. I don't know how old I am rightly. I know I am in my 78 year. I was carrying chain for Mr. Donnel. We started at the northwest corner of the Daniel Reese. I know it was the Reese. Donnel had his papers, and I owned the one-half of these eight tracts. We run from that corner east on top of the Little Mountain. We ran up to the Billington tract, then ran across to the little swamp, some 300 or 350 rods across; found two line trees near the creek—a pine and hemlock. I saw them many, many times after Donnel marked them. Donnel did not block them; he did not block any trees. I cannot tell what the course is from the corner of the Billington over to the swamp. I don't remember about the degrees, &c. At the swamp we found a stone corner, stone piled up. All Donnel said was, "This is the corner; here is where we located the warrants 21 or 22 years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was that line; I knew it was that line. That swamp is 50 or 60 rods from Rockefeller's corner; it is between 40 and 60 rods. I owned the
412 undivided one-half of eight surveys of these surveys. I knew where the southern boundary was. I might have said I did not know where the southern boundary was; I don't know any southern boundary only the one Donnel run. I had not sold yet when Rockefeller made the survey for Bellas. I knew there was a southern boundary; only the Donnel and Rockefeller run one. I might have said I did not exactly know where the southern line was. Rockefeller run one which he said was right, and Donnel had run one which he had said was right. There was a stone corner there and maple sprouts. The timber was very scarce there, right where this corner was. From this corner we run west across the pike to a point 4 or 5 rods north of the culvert; then run across the Thompson road to a water pond; from there we went home. The next day was Friday, and I went to carry the mail. My brother then went in my place. I have been over the line between Reynolds and Billington since that time. I was on the line from the swamp to the top of the Little Mountain and back again. W. W. McWilliams, Geo. W. West, Ira T. Clement, and a couple of surveyors were with me that
413 I did not know. This party sent for me to go with them. I may say that I passed that corner 150 times after I was there with Donnel. It was in my way there when I hunted every season. I passed and repassed 30 or 40 times every season hunting there. I have killed deer there since 1850.

In chief:

Do you think the sprouts had in court ever sustained a tree?

Answer. I have seen the David Rockefeller sprouts in court. I do not think they ever sustained a tree—only a stool.

Mr. Oram objects to this last question and answer—

First. Because the question is leading.

Second. Because the witness could not possibly have had any knowledge of the fact about which he questioned.

Third. because it is a fact to be found by the jury, and because the answer is a mere conjecture and not evidence of an existing fact.

414 By WITNESS: I have had a good deal of experience in woodcraft. These mountains burn over about once in three years. They burn over as soon as leaves collect. These sprouts exhibited in court were sprouts that sprung up there after a fire had gone over. After a fire has burned over maple sprouts they grow up again and form what is called a stool. I would call these sprouts a stool. On the north side of a dry mountain it is difficult to find a maple tree. They require wetter ground. There are plenty at the swamp. The ground is wet about the swamp. Swamp covers about two or three acres. Northwest corner of the Daniel Reese is at the point of the mountain; the Donnel lines 3 or 4 rods south of the red house.

XX:

Maple stools spring from maple roots. There are not always roots where there are stools that were originally a large tree. I saw these roots in court; they never sustained a tree. This one they had in court only had two roots; there may be some little roots. Stools sometimes form from where the tree burns down; when a tree burns down it sometimes sprouts. I hardly think when a tree
415 burns down that it afterwards grows much. I don't think a maple stool would last for twenty years anywhere.

JOHN FISHER.

Sworn & subscribed before me this thirteenth day of May, A. D. 1878.

Witness my hand and notarial seal.

JAMES K. DAVIS, JR.,
Notary Public.

I hereby certify that the above witness, John Fisher, was duly qualified and examined at the time and place stated in the above caption, in my presence, and that the testimony is as fully and correctly reported as was given

Witness my hand and seal this 13th day of May, 1878.

[SEAL.] JAMES K. DAVIS,
Notary Public.

The court sustains the objections to the declarations of Henry Donnell and rejects those portions of the deposition embraced in brackets, and at the instance of defendant seals this bill of exceptions this 17th day of December, 1883.

M. W. ACHESON. [SEAL.]

416 And thereupon the counsel for the said Ira T. Clement. plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for the Plaintiff in Error.

417 4 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial of the said case in the circuit court the counsel for the said defendant, Ira T. Clement, to maintain the issue on the part of the defendant, made the following offer of testimony:

"Defendant's counsel propose to prove by general reputation among surveyors who are acquainted with the lands in the vicinity of the Brush Valley block and in the neighborhood that Henry Donnel was assistant under the party who made that survey, and who was reputed to have surveyed the lines in Shamokin township, Northumberland county, in 1793 and 1794, to be followed by the testimony of John Fisher that he, Fisher, assisted Henry Donnel to survey the lands in dispute in 1814 and 1815, and while actually engaged in the survey, when at the south end of the
418 line, between the Billington and the Reynolds, that Donnel said at that time, in connection with his running these sur-

veys and when actually engaged thereon, that 21 or 22 years ago we located these lines; and Mr. Donnel said 'this is the corner,' pointing to the corner as claimed by the defendant;" and prayed the court there that the same might be given in evidence to said jurors.

To which the counsel for the plaintiff objected as follows:

"Objected to by plaintiff's counsel for the reason stated in the offer next preceeding, and for the additional reason that it is incompetent and irrelevant."

Objections to preceeding offer:

"Counsel for plaintiff objects to the paper offered as the deposition which purports to be a deposition taken under agreement between counsel *to read* to be read upon the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and The Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of this court; that the several cases referred to in the deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials, and it was never competent to meet it under the rules of court, John Fisher being at the time living and able to attend court, and did attend court, and his testimony was taken in those trials and printed in the paper books from which the testimony of deceased witness have been read on this trial; and further objects for the reason that it was taken between other parties, and that he is neither privy or party to the suit in which the deposition was taken, and that he claims, by title derived at sheriff
419 sale, a legal process, a portion or all the property that was claimed by the Northumberland Coal Company, the party to the former action; and, further, that the deposition upon its face shows that the declarations which are offered to be proven by the deposition was not part of the *res gesta*, and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declaration relates, but they were of past matter of which there is no evidence that the declarant had any knowledge. Plaintiff further objects that the declaration referred to in the deposition now made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act of which —, throw no evidence of which the declarant had any knowledge other than his own declaration."

The court sustained the objections and rejected the evidence.

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be re-

versed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

420 5 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said circuit court the court charged the jury as follows:

"The William Elliott is one of a block of surveys of the date of October 21st and 22nd, 1794, embracing what are known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands. The call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds. There is no controversy on the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans, and Jesse Brooks, which line was run and marked on the ground
421 by the deputy surveyor on the 17th of October, 1793. The William Elliott, calling on the south for the last-named surveys and on the north for the David Resse, Charlotte Ruston, Mary Myers, and John Reynolds, rightfully embraces all the lands within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for by the William Elliott may be, to that line it must go."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, an-

nulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for the Plaintiff in Error.

422 6 *Ex.*

Supreme Court of the United States. October term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said circuit court the court charged the jury as follows:

"The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances or from a certain alleged maple corner on the south, the same practical result for the purpose of this case being reached by whichever of these two methods the location is effected.

The location upon which the defendant insists involves a wide departure from the official returns of survey.

For example: The official length of the eastern line of the Samuel Lobdell is 320 rods. The defendant's location lengthens this line 32 rods, thus carrying the southern line of the block at its eastern end that much further south.

423 At the division line between John Reynolds and Thomas Billington the defendant's location places the southern line of the block 61 rods south of the official distances, measuring from the north line. The official length of the western line of the Daniel Reese is 340 rods. The defendant's location, however, gives this line 426 rods, or an increase of 86 rods, thus carrying the southern line of the block at its western end that much further south.

If the true southern line of the Brush Valley block is where the defendant locates it the land in controversy belongs to that block and is covered by the Charlotte Ruston and Mary Myers.

On the other hand, if the southern line of the block is where the plaintiff contends the land in controversy is outside of that block and is within the lines of the William Elliott."

And thereupon the counsel for the said Ira T. Clement, plaintiff

in error, did then and there except to the aforesaid charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

424 7 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court the said court charged the jury as follows:

"The plaintiff has brought into court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block. A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state that they find no old axe mark on this exhibit and no evidence of any. Several of these witnesses testify that they saw this gum when standing and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evidence of an ancient axe mark. In the midst of this conflicting testimony, which is well calculated to excite at least a doubt both as to the existence of an ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the de-
425 fendant's surveyor took from the tree would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter.

"But the defendant has not produced it, nor has he given any evidence explanatory of its absence. This block was taken out as

late as January last and was in the possession or under the control of the defendant. The withholding it, then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree. The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793. One of these is a chestnut oak at 140 rods westwardly from the southeast corner of the Samuel Lobdell, which tree was discovered and blocked by A. J. Guffy, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffy, Mr. West, and Mr. Boyer testify counted back to 1793. T. W. Moore, however, one of the defendant's surveyors, says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands. A. K. White, a surveyor, testifies that he counted this block at Lock Haven at a previous trial and that it counted but 82 years, which would make it too young by four years for the survey of 1793. To the like effect is the testimony of George B. Strauch and Robert Ammerman, surveyor, whose testimony at the trial at Lock Haven has been read in this case. William T. Mitchell also counted the block at the Lock Haven trial, and he testifies that it counted but 82 years. Here there is a direct conflict between the expert witnesses who have examined the block from the chestnut oak, and the greater number testify that the count fell short of the survey of 1793
426 by four years. The block itself, which, in connection with expert testimony, might have aided you essentially as well as correctly determining whether it bore an ancient axe mark at all (which is seriously disputed) as in solving the controverted question of age, has not been produced by the defendant, nor its absence accounted for. The evidence traces the block in the defendant's possession. It was used by him as an exhibit at the Lock Haven trial, and it was then called in question as it is here. Why is it now absent when it so vitally affects the case?"

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this writ, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

427 8 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said circuit court the court charged the jury as follows:

"We now direct your attention to another branch of this case. There lies to the east of the Samuel Lobdell and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin; that warrant, issued January 22, 1794, and the survey thereon, according to the official return, was made on the 23rd of February of that year. It was, it would seem, returned into the land office on the 28th of February, 1794, or three days before the return of the survey of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed still later. The
428 Richard Martin, therefore, is a survey junior to the Samuel Lobdell — it- fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless.

"In the nature of the case it is a matter of pure speculation on the part of these surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistant with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years."

And therefore the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be re-

versed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

429 9 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western district of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court the said court charged the jury as follows:

"The Richard Martin calls on the east for the Francis West, a survey of September 10, 1793, and these two surveys have a common south corner, viz., 'a post by a pine;' but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-seven (37) rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty (250) rods; whereas the actual length is two hundred and eighty-two (282) rods. The south line of the Richard Martin, running from the post by the pine, is north eighty-nine and three-fourths degrees (89¾°) west three hundred and eight (308) perches to a post. There is evidence tending to show that for the distance of about one hundred and fifty (150) perches from the post by
430 the pine that line is marked on the ground as of the date of the Martin survey; but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is three hundred and twenty-six rods long, the same as the Lobdell east line.

"Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin—a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell and thirty-two (32) rods farther south than the deputy surveyor supposed it was, and is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner

thirty-two (32) rods south of the southeast corner of the Samuel Lobdell, as defined by William Gray's official return, and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about thirty-two (32) rods further south than its official return locates it; and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block, and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be eighty-six (86) rods.

"To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot
431 control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block which are e-rlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence and may be considered by the jury, in connection with all the other evidence, in determining the question — of not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block; but the eleven surveys of that block must then be located from their fixed corners upon the northern line, according to the official courses and distances (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner)."

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for the Plaintiff in Error.

432 *10th Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said circuit court the court charged the jury as follows:

"We now direct your attention to another branch of the case. There lies to the east of the Samuel Lobdell and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant, issued January 22nd, 1794, and the survey thereon, according to the official returns, was made on the 23rd of February of that year it would seem returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still
433 later. The Richard Martin, therefore, is a survey junior to the Samuel Lobdell and its fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdell and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless. In the nature of the case it is a matter of pure speculation on the part of the surveyors. The marks upon the ground, in respect to age, the defendant's surveyors admit are consistant with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years. The Richard Martin calls on the east for the Francis West, a survey of September 10th, 1793, and these two surveys have a common south corner, viz., a post by a pine; but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is 250 rods, whereas the actual length is 282 rods. The south line of the Richard Martin, running from the post by the pine, is north 89¾ degrees west 308 perches to a post. There — evidence tending to show that for a distance of about 150 perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that

line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is 326 rods long, the same as the Lobdell east line. Now, the defendant
434 surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell, and 32 rods further south than the deputy supposed it was, — is manifest from his mistake just a-verted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin so as to place its southwest corner 32 rods south of the southeast corner of the Samuel Lobdell as defined by William Gray's official return, and they insist that the Lobdell corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about 32 rods further south than its official return locates —, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distance as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be 86 rods. To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which
435 are earlier surveys. The location of a junior warrant might throw some light upon the location of a senior survey which it calls to adjoin. Hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury, in connection with all the other evidence, in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyors in 1793 to define the southern line for the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line according to the official courses and distances, unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given

for the said Ira T. Clement and against the said Elisha A.
436 Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

437 11*th Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit, that on the trial of the said case in the said circuit court the court charged the jury as follows:

"3rd. But should the evidence fail to satisfy the jury that said chestnut oak and gums or any of them are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern — of the block by running out the courses and distances as shown by the official returns of survey and the verdict must be for the plaintiff."

438 And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

439 12 *Exc.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit, that on the trial of the said case in the said circuit court counsel for the plaintiff requested the court to charge the jury as follows:

"2nd. That in the absence of marks upon the ground indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys, the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances as shown by the official return of survey, and cannot be extended to the south beyond their official distances."

To which point the court gave the following answer and direction to the jury:

"2nd point. This point is affirmed."

440 And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

441 13 *Ex. Pl'ff's Point.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit, that on the trial of the said case in the said circuit court counsel for the plaintiff requested the court to charge the jury as follows:

"5th. It being proved and not disputed in this case that the northern line of the Brush Valley surveys is well marked on the ground, and the corners of said surveys designated by the original marks definately fix the location of each individual survey in the batch, that in the absence of marks to fix definately the southern boundary the survey of the said batch must be located from the northern lines by running out courses and distances of said surveys according to the official returns of William Gray."

To which point the court gave the following answer and direction to the jury:

442 "5th point. This point is affirmed."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

443 14 *Ex. Pl'ff's Point.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit, that on the trial of the said case in the said circuit court counsel for the plaintiff requested the court to charge the jury as follows:

"11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jesse Brooks, and other older surveys on the south, and call to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds on the north; that, in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor, the William Elliott may go to its calls for adjoiners on the north.

"That, as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official courses
444 and distances from their northern line, or from the Rockefeller maple corner."

To which point the court gave the following answer and direction to the jury:

"11th point. This point is affirmed."

And therefore the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

445 15 *Ex. Def't's Point.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit, that on the trial of the said case in the said circuit court counsel for the defendant requested the court to charge the jury as follows:

"5th. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor, and in endeavoring to ascertain the proper location the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believe that the said two surveys which call for the Lobdell were located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdell, such fact would be of importance in as-
446 certaining the exact location of the Lobdell and of the block of surveys of which this is a part."

To which point the court gave the following answer and direction to the jury:

5th point. The jury may take into consideration the acts of the deputy surveyor mentioned in this point in determining the question whether or not the chestnut oak and the gums are trees marked by the surveyor in 1793 (as the defendant claims) to define the southern line of the block of eleven surveys, the Brush Valley block, but should the jury find that none of those trees were marked for the survey of 1793, then the facts upon which this point is based would be of no importance in determining the controversy in this case.

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and

the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

447 16*th Ex. Def't's Point.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said circuit court counsel for the defendant requested the court to charge the jury as follows:

"7th. If the jury believe that the William Elliott is one of a block of surveys known as the Lafevre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks or monuments corresponding with the date of survey of this block on the northern line of any one of these surveys would be monuments for the northern line of the William Elliott survey and establish the northern line of the William Elliott."

To which point the court gave the following answer and direction to the jury:

"7th point. This point as a whole is refused. The William
448 Elliott calls on the north for the Charlotte Ruston and Mary Myers and others, members of the Brush Valley block, and no marks on the ground have been found to limit that call; moreover, the official return of the Lewis Walker survey, one of the Lafevre block, which adjoins the William Elliott on the east, adopts the Reynolds-Billington maple as a northern monument for the Walker. As we have already instructed the jury in our general charge, wherever the true line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go."

And there*fore* the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions.

There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

449 17 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court, the counsel for the said defendant, Ira T. Clement, requested the court to charge the jury as follows:

"8th. If the jury believe the testimony of the defendant's surveyors, that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that course would be monuments fixing the whole northern line of the Le Fevre block, and a line run westward from the post by a pine corner by the official courses and distances of the northern line of said block by these trees would establish the northern line of the William Elliott survey."

450 To which point the court gave the following answer and direction to the jury.

"8th point. This point is refused."

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A.

Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for the Plaintiff in Error.

451 18 *Ex.*

Supreme Court of the United States. October Term, 1884.

IRA T. CLEMENT, Plaintiff in Error,
vs.
ELISHA A. PACKER, Defendant in Error. } No. —.

In error to the circuit court of the United States for the western circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the circuit court the counsel for the said defendant, Ira T. Clement, to maintain the said issue on the part of the defendant, requested the court to charge the jury as follows:

"10th. That any monument on the ground called for and adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and in the present case, if the jury believe that any part of the southern line of the block of eleven or Brush Valley block was run by the deputy surveyor either from or to intersect the post by a pine as a mark indicating the location of the said southern line, the said post by a pine would be a monument which would control the mere evidence of official distances."

To which point the court gave the following answer and direction to the jury:

"10th point. As a naked proposition this point is correct
452 and it is affirmed, but the jury will understand from our general charge that if they find that the chestnut oak and gums upon which the defendant relies are not trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block the post by the pine would have no control in the location of that block."

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said charge and opinion of the said court; and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is

also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 143. Ira T. Clement, plaintiff in error, *vs.* Elisha A. Packer. Filed 21st October, 1884.

125-301

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 143.

IRA T. CLEMENT, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

AMENDED SPECIFICATIONS OF ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 143.

IRA T. CLEMENT, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

AMENDED SPECIFICATIONS OF ERROR.

First. The court erred in rejecting the evidence contained in the second bill of exceptions (page 179 of Record).

"Counsel for defendant offer in evidence the patents to Peter Graul for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham surveys, being the La Fevre block, William Elliott, dated the 13th of April, 1797; the Lewis Walker, the 12th of April, 1797; the Nathaniel Brown, the 13th day of April, 1797; the Ebenezer Branham, the 17th day of April, 1797, and the William Shannon, the 13th day of April, 1797, for the purpose of location and showing that the Commonwealth confirmed the location of the said surveys as a block by granting patents to one of them, and also for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys," and prayed the court that the same might be read and given in evidence to the said jurors; to which the counsel for the plaintiff objected as follows:

"Counsel for the plaintiff object upon the ground that he claims

under Dr. Ruston, who, by virtue of the payment of the purchase-money for several tracts of land known as the La Fevre lands, was the owner thereof; that his title gained with the inception of the parts from the Commonwealth location of lands upon the ground in 1793; the patent or patents appear to have been issued to a stranger and show no connection between himself and the warrantee or Dr. Rusten, and therefore the patent is not evidence as against Dr. Ruston or those claiming under him for any purpose whatever. The patent is not evidence upon the subject of location, in any event, the question of location vesting in the evidence in connection with the official survey itself. The patent is a completion of the title above and not necessarily part of the last, and definitely fixes the quantity of land intended to be conveyed by the Commonwealth when such land is granted, either to the warrantee or the party holding the right, title, and interest to the patent."

The court sustained the exceptions and rejected the evidence.

Second. The court erred in rejecting the evidence contained in the third bill of exceptions (page 181 of Record) as follows:

"Counsel for defendant offer in evidence deposition of John Fisher, taken on rules to take depositions in cases numbered 394, 395, 396, and 397, of January term of 1874, in the common pleas of Northumberland county, and 103, of November term, 1872, of the same county, and agreed to be read in all the cases, subject to exceptions as to incompetency (*pro ut* deposition hereto attached and made part of this bill), it being admitted by both parties that John Fisher is dead," and prayed that the same might be given and read in evidence to the said jury; to which the counsel for the plaintiff objected as follows:

Counsel for plaintiff object to the paper offered as the deposition, which purports to be a deposition taken under an agreement between counsel, to be read on the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and the Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of the court; that the several cases referred to in the deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials and it was never competent to meet it under the rules of court, John Fisher being at the time living and able to attend court, and did attend court, and his testimony was taken in those trials and was printed in the proper books, from which the testimony of deceased witnesses have been read in the trial of this case.

And plaintiff further objects for the reason that it was taken between other parties, and that he is neither privy nor party to the suit in which the deposition was taken, and that he claimed, by title derived at sheriff's sale—a legal process—a portion of all the property that was claimed by the Northumberland Coal Company, the party to the former action.

And, further, that the deposition on its face shows that the declarations which are offered to be proven by the deposition were not a part of any *res gesta*, and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declarations relate, but they were of past matter, of which there is no evidence that the declarant had any knowledge.

Plaintiff further objects that the declarations referred to in the deposition were made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act, of which there is no evidence of which the declarant had any knowledge other than his own declaration.

"It is admitted that the deposition of John Fisher, filed in the court of common pleas of Northumberland county, of No. 394, of January term, 1874, in the case of Ira T. Clement *vs.* The Northumberland Coal Company, of June 12, 1878, *that it* was taken May 13, 1878, after the verdict of the jury in that case and after the witnesses had testified at the trial of the case."

DEPOSITION.

John Fisher produced and sworn on the part of the plaintiff:

By WITNESS: I reside in Shamokin township; lived there since 1812; lived near the line of Columbia county; line divided the farm I lived upon. I am between 75 and 78 years of age. I was born in 1799. I will be 79 years old next September. My father's name was Henry Fisher. My father never owned any of the Brush Valley lands. I owned the undivided one-half of eight tracts. I was with Henry Donnel when he run part of these lines, in August or September, in 1815 or '16. He run them the same year I carried the mail. It was between 1814 and 1816. I know it was the time I was carrying the mail. I commenced carrying mail in 1815. He started to survey at that time at the northwest corner of the Daniel Reese survey, in sight of my father's house. Then ran from there along the top of the mountain eastward to the corner of the Thomas Billington. Then we ran south between the Billington and Reynolds, south to the stone corner among maple sprouts over near the swamp. At that point we found a stone corner. The timber there

is very thin. There was no timber there at that time. It is very open; clear of timber. This is fifty or sixty rods south of Rockefeller's sprouts, where we found this stone corner. He started at the Billington corner and run south on the line between the Billington and Reynolds, past the Rockefeller sprouts, to a point fifty or sixty rods beyond where we found the stone corner with the maple sprouts, around at the north side of a swamp. This corner looked as though it had been filled up there for some time. We found two line trees on this cross-line between the Billington and the Reynolds; one was a hemlock, one a pine. William Leatherland and I were with Henry Donnel at that time. I carried chain. I was well acquainted with Henry Donnel. I knew him for four years before this. He boarded at my father's when he laid out a town for Tilghman. He was a surveyor. When he surveyed in that neighborhood he stopped with my father. He frequently surveyed there. He done a good deal of surveying in that country. He was at that time the principal surveyor of lands—done most of it. I had a conversation with him at that time about this line.

[Plaintiff proposes to ask the question what the conversation was he had with Henry Donnel at the time he was surveying these lines in 1815 relative to the location of these tracts of land—this corner—and work done by him, personally by him, twenty-one or twenty-two years before, when he located the Brush Valley surveys, to be followed by proof that Henry Donnel is dead.

For the purpose—

First. As hearsay evidence of the boundary of these tracts and location of their lines.

Second. For the purpose of showing where the southwest corner of the Billington and the southeast corner of the Reynolds were originally located on the ground in 1793.

Defendants object—

First. It is not proposed to show that Henry Donnel was the surveyor who run the lines in 1793 and who located the lands which the plaintiff calls the Brush Valley lands, and because any statements by Henry Donnel would not be evidence for such purpose.

Second. Because it is not proposed to show that Henry Donnel was present when the lands were located; that the testimony is not competent hearsay testimony of boundary, and not evidence for the purpose offered.

Third. Because it is irrelevant.]

By WITNESS: Mr. Donnel said at the time, while there at that corner, that twenty-one or twenty-two years ago "we located these warrants." When we got to this corner Mr. Donnel said, "Here is the corner," pointing to it. I saw that corner one hundred or one hundred and fifty times afterwards. I cannot say how often. I saw it ten or fifteen times every fall for thirty or forty years. I saw it while out hunting and out gathering berries. We could not get through the swamp, and was obliged to get around it on this side. I saw it sometimes every day. I hunted there because it was the best hunting ground there was on the mountain; it was more broken up. I hunted deer generally—any wild game we came across. We had a deer lick at the head of this swamp. There was a pine road led through there; went through there to hunt pine knots. There was an ore road run through there. I passed this corner many times with a horse to take deer home; we went around this corner to strike the old ore road. There is a spring near this corner—forms a little run there at the head of the swamp; swamp covers about two acres. I may have seen this corner before the time I was there with Donnel. I think I have seen this corner oftener than any other corner in the wood. [At the time Henry Donnel said he located these warrants, twenty-one or twenty-two years ago, he was surveying the Brush Valley lands. By the Brush Valley lands I mean the Ira T. Clement lands.] My father was agent for these Brush Valley lands to keep trespassers and shingle-makers off of the lands. From this stone corner we ran west toward the Daniel Reese. We crossed the pike some few rods from the spring, four or five rods from the culvert, south of it. The spring used now is two or two and one-half rods from the culvert and north of the old spring; they both came from the same opening. After we passed that spring we ran west until we crossed the Thompson road to a big water pond; then it was night. Next morning I went off with the mail and my brother went along. On the next Monday, at noon, I met them, and we started at the J. Adam Gilger line and run east some forty or fifty rods; then run north one hundred or one hundred and twenty rods, crossing Roaring creek and cornered on the bank at a little ash; then run west about forty or fifty rods to a small stone corner and small black oak in it; then went north to the northwest corner of the Dan. Reese, the place of beginning; at the southwest corner of the Reese we cut out the Gilger interference. The Daniel Reese, as laid down, interferes with the Gilger; the Gilger was the oldest warrant. The Gilger interference is in the valley. I know where the Gilger lines are as well as I know where this house stands. I was with Donnel when he run the Gilger interference. I know the maple and the ash corners. A day or two after I went along with Donnel again. We started at the northwest corner of the Billington and ran east on the top of Little Mountain to the northeast corner of the Thomas Ruston or Mary Ruston, Jr., one or the other;

then ran south across the valley up to the top of Big Mountain, in a cove. There was a corner there; it was between the bear path and the Catawissa path. The Catawissa path started out of the pike at the little field, on top of the mountain; we always called it the Catawissa path.

The little field is on Green Ridge, which lies between Big Mountain and Mount Carmel borough. This path run on into Roaring Creek Valley, northeast from that field, in the direction of Catawissa; it was used for foot travel and horseback travel; it was an old path. The old settlers of Roaring Creek Valley said it was a good path when they went there; they called it the Indian path and sometimes Lee's path. We called it Catawissa path; it was there as long as I knew anything. I can recollect it as early as 1810.

The bear path was not as plain; it was traveled by wild animals principally; it started at Mahanoy and intersected the Catawissa path at the north side of Big Mountain, in the cove where Donnel fixed his corner; he fixed it between these two paths, about twenty or thirty rods east of the Catawissa path. In 1815 it was pretty plain; you could follow it for miles on the mountain.

From the corner in the cove Donnel run west to the littte swamp, to the corner of the Billington; that is the corner that I speak of as where we had the conversation; that was all the surveying we done at that time on the Brush Valley warrants. I think Donnel went home then, and afterwards went to run the McCall lands. I was taken there with surveyors to point out this corner—the common corner, southeast corner of the Reynolds and southwest corner of the Billington, at the head of the swamp—the Donnel corner. I pointed it out in a space not larger than this room, but could find no trace of it there then, but pointed the spot out where it had been. I showed them within a spot of eight or ten feet. I think W. W. McWilliams, George W. West, H. S. Boyer, and Ira T. Clements were along. When Donnel ran from the corner in the cove and from there to the corner at the head of the swamp, and from there to the Reese he was running the southern line of the Brush Valley warrants.

These lands were called the "asylum lands" and the "Holland purchase."

Cross-examined by Mr. ORAM:

It was in August or September, 1815, I was on these lands. I was never on them more than once. Wm. Leatherland was with us; he helped carry chain and kept Donnel's notes. I was born in 1799, 20th day September. I don't know how old I am rightly; I know I am in my 78th year. I was carrying chain for Mr. Donnel. We started at the northwest corner of the Daniel Reese; I know it was the Reese. Donnel had his papers and I owned the one-half of these eight tracts. We run from that corner east on top of the Little Mountain. We ran up to the Billington tract, then ran across to the little swamp—some three hundred or three hundred and fifty

rods across; found two line trees near the creek—a pine and hemlock. I saw them many, many times after Donnel marked them. Donnel did not block them; he did not block any trees. I cannot tell what the course is from the corner of the Billington over to the swamp. I don't remember about the degrees, &c. At the swamp we found a stone corner—stone piled up. (All Donnel said was, "This is the corner; here is where we located the warrants twenty-one or twenty-two years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was that line; I knew it was that line.) That swamp is fifty or sixty rods from Rockefeller's corner; it is between forty and sixty rods. I owned the undivided one-half of eight surveys of these surveys. I knew where the southern boundary was. I might have said I did not know where the southern boundary was. I don't know any southern boundary only the one Donnel run. I had not sold yet when Rockefeller made the survey for Bellas. I knew there was a southern boundary; only the Donnel and Rockefeller run one. I might have said I did not exactly know where the southern line was. Rockefeller run one which he said was right, and Donnel had run one which he had said was right. There was a stone corner there and maple sprouts. The timber was very scarce there, right where this corner was. From this corner we run west across the pike to a point four or five rods north of the culvert, then run across the Thompson road to a water pond; from there we went home. The next day was Friday, and I went to carry the mail. My brother then went in my place. I have been over the line between Reynolds and Billington since that time. I was on the line from the swamp to the top of the Little Mountain and back again. W. W. McWilliams, George W. West, Ira T. Clement, and a couple of surveyors were with me that I did not know. This party sent for me to go with them. I may say that I passed that corner one hundred and fifty times after I was there with Donnel. It was in my way there when I hunted every season. I passed and repassed thirty or forty times every season, hunting there. I have killed deer there since 1850.

In chief:

Question. Do you think the sprouts had in court ever sustained a tree?

Answer. I have seen the David Rockefeller sprouts in court. I do not think they ever sustained a tree—only a stool.

Mr. ORAM objects to this last question and answer—

First. Because the question is leading.

Second. Because the witness could not possibly have had any knowledge of the fact about which he is questioned.

Third. Because it is a fact to be found by the jury, and because the answer is a mere conjecture and not evidence of an existing fact.

By WITNESS:

I have had a good deal of experience in woodcraft. These mountains burn over about once in three years. They burn over as soon as leaves collect. These sprouts exhibited in court were sprouts that sprung up there after a fire had gone over. After a fire has burned over maple sprouts they grow up again and form what is called a stool. I would call these sprouts a stool. On the north side of a dry mountain it is difficult to find a maple tree. They require wetter ground. There are plenty at the swamp. The ground is wet about the swamp. Swamp covers about two or three acres. Northwest corner of the Daniel Reese is at the point of the mountain; the Donnel lines three or four rods south of the red house.

Recross-examined:

Maple stools spring from maple roots. There are not always roots where there are stools that were originally a large tree. I saw these roots in court; they never sustained a tree. This one they had in court only had two roots; there may be some little roots. Stools sometimes form from where the tree burns down; when a tree burns down it sometimes sprouts. I hardly think when a tree burns down that it afterwards grows much. I don't think a maple stool would last for twenty years anywhere.

JOHN FISHER.

Sworn and subscribed before me this thirteenth day of May, A. D. 1878.

Witness my hand and notarial seal.

JAMES K. DAVIS, JR.,
Notary Public.

I hereby certify that the above witness, John Fisher, was duly qualified and examined at the time and place stated in the above caption, in my presence, and that the testimony is as fully and correctly reported as was given.

Witness my hand and seal this thirteenth day of May, 1878.

[SEAL.] JAMES K. DAVIS.
Notary Public.

The court sustains the objections to the declarations of Henry Donnel and rejects those portions of the depositions embraced in brackets, and at the instance of defendant seals this bill of exceptions this 17th day of December, 1883.

M. W. ACHESON. [SEAL.]

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasions of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Third. The court erred in rejecting the evidence contained in the fourth bill of exceptions (page 187 of Record) as follows:

"Defendant's counsel propose to prove by general reputation among surveyors who are acquainted with the lands in the vicinity of the Brush Valley block and in the neighborhood that Henry Donnel was assistant under the party who made that survey and who was reputed to have surveyed the lines in Shamokin township, Northumberland county, in 1793 and 1794, to be followed by the testimony of John Fisher that he, Fisher, assisted Henry Donnel to survey the lands in dispute in 1814 and 1815, and while actually engaged in the survey, when at the south end of the line, between the Billington and the Reynolds, that Donnel said at that time, in connection with his running these surveys and when actually engaged thereon, that twenty-one or twenty-two years ago we located these lines; and Mr. Donnel said, 'This is the corner,' pointing to the corner as claimed by the defendant;" and prayed the court there that the same might be given in evidence to said jurors.

To which the counsel for the plaintiff objected as follows:

"Objected to by plaintiff's counsel for the reason stated in the offer next preceding, and for the additional reason that it is incompetent and irrelevant."

Objections to preceding offer:

"Counsel for plaintiff object to the paper offered as the deposition which purports to be a deposition taken under agreement between counsel *to read* to be read on the trial of certain cases then pending in the court of common pleas of Northumberland county, wherein Ira T. Clement was plaintiff and The Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of this court; that the several cases referred to in the deposition have been tried and finally dis-

posed of, and that this deposition was never read at any of the trials and it was never competent to meet it under the rules of court, John Fisher being at the time living and able to attend court and did attend court, and his testimony was taken in those trials and printed in the paper books from which the testimony of deceased witnesses have been read on this trial; and further objects for the reason that it was taken between other parties, and that he is neither privy nor party to the suit in which the deposition was taken, and that he claims, by title derived at sheriff's sale, a legal process, a portion or all the property that was claimed by the Northumberland Coal Company, the party to the former action; and, further, that the deposition upon its face shows that the declarations which are offered to be proven by the deposition was not part of the *res gesta*, and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declaration relates, but they were of past matter of which there is no evidence that the declarant had any knowledge. Plaintiff further objects that the declaration referred to in the deposition now made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act which —, throw no evidence of which the declarant had any knowledge other than his own declaration."

The court sustained the objections and rejected the evidence.

Fourth Specification of Error.

The court erred in charging the jury, as set forth in the fifth bill of exceptions (see Record, page 189), as follows:

"The William Elliott is one of a block of surveys of the date of October 21 and 22, 1794, embracing what are known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands. The call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds. There is no controversy on the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans, and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793. The William Elliott, calling on the south for the last-named surveys and on the north for the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds, rightfully embraces all the lands within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for the William Elliott may be, to that line it must go."

The facts proved which make this part of the general charge error are—

1st. Evidence was offered showing that the William Elliott was one of a block of surveys composed of the William Elliott, Lewis

Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham tracts, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person. (See printed Record, pages 66, 67, and 68.)

2d. There was proof of original marks upon the ground on the northern line of the Ebenezer Branham, one of the surveys of the block, sufficient to establish the northern line of that tract. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, and 107 of the Record; see also testimony of H. S. Boyer, pages 107 and 108; see also testimony of George W. West, pages 108 and 109 of the Record, and testimony of M. B. Trescott, pages 68, 69, 74, and 76; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49, 50, and 52.)

3d. There was also proof of two original marked line trees on the north line of the Lewis Walker survey, another tract of the block. (See testimony of M. B. Trescott, pages 79, 80, and 81 of the Record.) Other surveyors testified to the same effect. (See page 103 of the Record.)

4th. There was also a proof of an original chesnut oak line tree on the northern line of the Ebenezer Branham survey, south of the Samuel Lobdil survey. (See page 103 of the record.) Other surveyors for the defendant testified to the same effect (page 107).

Fifth Specification of Error.

The court erred in charging the jury, as set forth in the sixth bill of exceptions (See Record, page 190), as follows:

"The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances or from a certain alleged maple corner on the south, the same practical result for the purpose of this case being reached by whichever of these two methods the location is effected.

"The location upon which the defendant insists involves a wide departure from the official returns of survey.

"For example: The official length of the eastern line of the Lobdil is three hundred and twenty rods. The defendant's location lengthens this line thirty-two rods, thus carrying the southern line of the block at its eastern end that much further south.

"At the division line between John Reynolds and Thomas Billington the defendant's location places the southern line of the block sixty-one rods south of the official distances, measuring from the north line. The official length of the western line of the Daniel Reese is three hundred and forty rods. The defendant's location, however, gives this line four hundred and twenty-six rods, or an increase of eighty-six rods, thus carrying the southern line of the block at its western end that much further south.

"If the true southern line of the Brush Valley block is where the

defendant locates it, the land in controversy belongs to that block and is covered by the Charlotte Ruston and Mary Myers.

"On the other hand, if the southern line of the block is where the plaintiff contends the land in controversy is—outside of that block and is within the lines of the William Elliott."

The facts proved which make this part of the general charge error are—

1st. Evidence was offered showing that the William Elliott was one of a block of surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham tracts, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person. (See printed Record, pages 66, 67, and 68.)

2d. There was proof of original marks upon the ground on the northern line of the Ebenezer Branham, one of the surveys of the block, sufficient to establish the northern line of that tract. (See testimony of A. J. Duffy and A. K. White, pages 103, 104, 105, 106, and 107 of the Record; see also testimony of H. S. Boyer, pages 107, and 108; see also testimony of George W. West, pages 108 and 109 of the Record, and testimony of M. B. Trescott, pages 68, 69, 74, and 76; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49, 50, and 52.)

3d. There was also proof of two original marked line trees on the north line of the Lewis Walker survey, another tract of the block. (See testimony of M. B. Trescott, pages 79, 80, and 81 of the Record.) Other surveyors testified to the same effect. (See page 103 of the Record.)

4th. There was also proof of an original chestnut oak line tree on the northern line of the Ebenezer Branham survey, south of the Samuel Lobdil survey. (See page 103 of record.) Other surveyors for the defendant testified to the same effect (page 107).

Sixth Specification of Error.

Sixth. The court erred in charging the jury as set forth in the seventh bill of exceptions (page 191 of Record):

"The plaintiff has brought into court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block. A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state they find no old axe mark on this exhibit and no evidence of any. Several of these witnesses testify that they saw this gum when standing and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evidence of an ancient axe mark. In the midst of this conflicting testimony, which is well calculated to excite at least a doubt, both as to the existence of an

ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the defendant's surveyor took from the tree would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter.

"But the defendant has not produced it, nor has he given any evidence explanatory of its absence. This block was taken out as late as January last, and was in the possession or under the control of the defendant. The withholding it, then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree. The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793. One of these is a chestnut oak at one hundred and forty rods westwardly from the southeast corner of the Samuel Lobdil, which tree was discovered and blocked by A. J. Guffy, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffy, Mr. West, and Mr. Boyer testify counted back to 1793. T. W. Moore, however, one of the defendant's surveyors, says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands. A. K. White, a surveyor, testifies that he counted this block at Lock Haven at a previous trial, and that it counted but eighty-two years, which would make it too young by four years for the survey of 1793. To the like effect is the testimony of George B. Strauch and Robert Ammerman, surveyor, whose testimony at the trial at Lock Haven has been read in this case. William T. Mitchell also counted the block at the Lock Haven trial, and he testifies that it counted but eighty-two years. Here there is a direct conflict between the expert witnesses who have examined the block from the chestnut oak, and the greater number testify that the count fell short of the survey of 1793 by four years. The block itself, which, in connection with expert testimony, might have aided you essentially as well as correctly in determining whether it bore an ancient axe mark at all (which is seriously disputed) as in solving the controverted question of age, has not been produced by the defendant nor its absence accounted for. It was used by him as an exhibit at the Lock Haven trial, and it was then called in question as it is here. Why is it now absent when it so vitally affects the case?"

Seventh Specification of Error.

The court erred in charging the jury, as set forth in the eighth bill of exceptions (page 193 of the Record), as follows:

"We now direct your attention to another branch of this case. There lies to the east of the Samuel Lobdil and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant issued January 22, 1794, and the survey thereon,

were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line, according to the official courses and distances (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner)."

The facts proved which make this part of the general charge error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner" called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys is well established on the ground by the testimony of both plaintiff's and defendant's surveyors and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was, and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of these surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S. Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs, in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlot Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute

a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record); and official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys, in names of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham, also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person (see Record, pages 66, 67, and 68); also official connected drafts in evidence (pages 67 and 68).

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches (see pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence (page 68); shown also on maps Nos. 2 and 3 of appendix.

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record.)

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its adjoiner on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78. To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.)

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time, as the Brush Valley block of surveys. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north and south lines of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

There was also proof tending to show that the location of the Branham and the Martin survey by the "post by a pine" corner and the line trees found between them would conform to the sur-

vey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey; that the deputy surveyor in 1793 located the southern line of the Brush Valley block of eleven surveys south of their official distance. (See separate official copies of these returns of survey in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft in evidence, page 66, and maps Nos. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys; and—

11th. There was testimony of skillful and experienced surveyors tending to show, from their experience as surveyors, work done on the ground and monuments found; that the dividing line between the plaintiff's and defendants' blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793. (See reasons given by M. B. Trescott, page 85 of Record). To the same effect was the testimony of H. S. Boyer, George W. West, A. J. Guffy, James Caldwell, F. W. Moore, and R. F. Brown (page 105).

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor, who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, on the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp on the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See record, pages 71, 72, 79, and 110.)

Ninth Specification of Error.

The court erred in charging the jury as set forth in the tenth bill of exceptions (see Record, page 196) as follows:

"We now direct your attention to another branch of the case. There lies to the east of the Samuel Lobdil and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant, issued January 22, 1794, and the survey

thereon, according to the official returns, was made on the 23d of February of that year, it would seem returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later. The Richard Martin, therefore, is a survey junior to the Samuel Lobdil and its fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdil and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless. In the nature of the case it is a matter of pure speculation on the part of the surveyors. The marks upon the ground, in respect to age, the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years. The Richard Martin calls on the east for the Francis West, a survey of September 10, 1793, and these two surveys have a common south corner, viz., a post by a pine, but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty rods, whereas the actual length is two hundred and eighty-two rods. The south line of the Richard Martin, running from the post by the pine, is north eighty-nine and three-fourths degrees west three hundred and eight perches to a post. There — evidence tending to show that for a distance of about one hundred and fifty perches from the post by the pine that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdil on the west, and its official west line is three hundred and twenty-six rods long, the same as the Lobdil east line. Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdil, and thirty-two rods farther south than the deputy supposed it was, — is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin so as to place its southwest corner thirty-two rods south of the southeast corner of the Samuel Lobdil, as defined by William Gray's official return, and they insist that the Lobdil corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdil tract about thirty-two rods farther south than its official return locates, — and continuing the like process westwardly

they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distance, as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be eighty-six rods. To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdil and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant might throw some light upon the location of a senior survey which it calls to adjoin. Hence, what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury, in connection with all the other evidence, in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyors in 1793 to define the southern line for the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line according to the official courses and distances, unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner."

The facts proved which make this part of the general charge error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner," called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys, is well established on the ground by the testimony of both plaintiff's and defendant's surveyors, and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well-recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of those surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record); an official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time and owned by one person. (See Record, pages 66, 67, and 68; also official connected drafts in evidence, pages 67 and 68.)

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches. (See pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence, page 68; shown also on maps Nos. 2 and 3 of appendix.)

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant he returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record).

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its

adjoining on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78.) To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time as the Brush Valley block of survey. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north line of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

9th. There was also proof tending to show that the location of the Branham and the Martin surveys by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey, and that the deputy surveyor, in 1793, located the southern line of the Brush Valley block of eleven surveys south of their official distance.

(See separate official copies of these returns of survey, in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft, in evidence, page 68, and maps No. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys); and

11th. There was testimony of skillful and experienced surveyors tending to show from their experience as surveyors work done on the ground and monuments found; that the dividing line between the plaintiff's and defendant's blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793.

See reasons given by M. B. Trescott, (page 85 of Record.) To the same effect was the testimony of H. S. Boyer, Geo. W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown, (page 103.)

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor,

who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, in the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp, in the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See Record, pages 71, 72, 79, and 110.)

Tenth Specification of Error.

The court erred in charging the jury, in the third division of the general results of the charge (see page 22; also page 139), as follows:

"3d. But should the evidence fail to satisfy the jury that said chestnut oak and gums, or any of them, are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern — of the block by running out the courses and distances as shown by the official returns of survey, and the verdict must be for the plaintiff."

The facts proved which make this part of the general charge error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner" called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys is well established on the ground by the testimony of both plaintiff's and defendant's surveyors and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was, and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of these surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S. Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs, in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlot Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record): and official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys, in names of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham, also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person (see Record, pages 66, 67, and 68); also official connected drafts in evidence (pages 67 and 68).

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches (see pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence (page 68); shown also on maps Nos. 2 and 3 of appendix.

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record.)

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its

adjoiner on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78. To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.)

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time, as the Brush Valley block of surveys. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north and south lines of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

9th. There was also proof tending to show that the location of the Branham and the Martin survey by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey; that the deputy surveyor in 1793 located the southern line of the Brush Valley block of eleven surveys south of their official distance. (See separate official copies of these returns of survey in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft in evidence, page 66, and maps Nos. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys; and—

11th. There was testimony of skillful and experienced surveyors tending to show, from their experience as surveyors, work done on the ground and monuments found; that the dividing line between the plaintiff's and defendants' blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793. (See reasons given by M. B. Trescott, page 85 of Record). To the same effect was the testimony of H. S. Boyer, George W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown (page 105).

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor, who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814,

and declared that the maple corner between the Billington and Reynolds, on the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp on the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See record, pages 71, 72, 79, and 110.)

Eleventh Specification of Error.

The court erred in answering the plaintiff's eleventh point, contained in the twelfth bill of exceptions (page 167 of Record), which point and answer are as follows:

"2d. That in the absence of marks upon the ground indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances, as shown by the official return of survey, and cannot be extended to the south beyond their official distances."

To which point the court gave the following answer and direction to the jury:

"2d point. This point is affirmed."

The facts proved which make this answer error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner," called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys, is well established on the ground by the testimony of both plaintiff's and defendant's surveyors, and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well-recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of those surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record); an official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time and owned by one person. (See Record, pages 66, 67, and 68; also official connected drafts in evidence, pages 67 and 68.)

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches. (See pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence, page 68; shown also on maps Nos. 2 and 3 of appendix.)

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant he returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record).

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its

adjoining on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78.) To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time as the Brush Valley block of survey. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north line of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

9th. There was also proof tending to show that the location of the Branham and the Martin surveys by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey, and that the deputy surveyor, in 1793, located the southern line of the Brush Valley block of eleven surveys south of their official distance.

(See separate official copies of these returns of survey, in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft, in evidence, page 68, and maps No. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys); and

11th. There was testimony of skillful and experienced surveyors tending to show from their experience as surveyors work done on the ground and monuments found; that the dividing line between the plaintiff's and defendant's blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793.

See reasons given by M. B. Trescott, (page 85 of Record.) To the same effect was the testimony of H. S. Boyer, Geo. W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown, (page 103.)

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor,

who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, in the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp, in the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See Record, pages 71, 72, 79, and 110.)

Twelfth Specification of Error.

The court erred in answering the plaintiff's fifth point, contained in the thirteenth bill of exceptions (page 200 of Record), which point and answer are as follows:

"It being proved and not disputed in this case that the northern line of the Brush Valley surveys is well marked on the ground, and the corners of said surveys designated by the original marks definitely fix the location of each individual survey in the batch, that in the absence of marks to fix definitely the southern boundary the survey of the said batch nust be located from the northern lines by running out courses and distances of said surveys according to the official returns of William Gray."

To which point the court gave the following answer and direction to the jury:

"5th point. This point is affirmed."

The facts proved which make this answer error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner" called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys is well established on the ground by the testimony of both plaintiff's and defendant's surveyors and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was, and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of these surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S. Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs, in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlot Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record): and official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys, in names of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham, also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person (see Record, pages 66, 67, and 68); also official connected drafts in evidence (pages 67 and 68).

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches (see pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence (page 68); shown also on maps Nos. 2 and 3 of appendix.

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that

its western line was 320 rods in length, and three days after he had exhausted his power over this warrant returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record.)

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its adjoiner on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78. To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.)

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time, as the Brush Valley block of surveys. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north and south lines of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

9th. There was also proof tending to show that the location of the Branham and the Martin survey by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey; that the deputy surveyor in 1793 located the southern line of the Brush Valley block of eleven surveys south of their official distance. (See separate official copies of these returns of survey in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft in evidence, page 66, and maps Nos. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys; and—

11th. There was testimony of skillful and experienced surveyors tending to show, from their experience as surveyors, work done on the ground and monuments found; that the dividing line between the plaintiff's and defendants' blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793. (See reasons given by M. B. Trescott, page 85 of Record). To the same effect was the

testimony of H. S. Boyer, George W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown (page 105).

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor, who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, on the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp on the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See record, pages 71, 72, 79, and 110.)

Thirteenth Specification of Error.

The court erred in answering the plaintiff's eleventh point, contained in the fourteenth bill of exceptions (page 201 of Record), which point and answer are as follows:

"11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jesse Brooks, and other older surveys on the south, and called to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds on the north; that, in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor, the William Elliott may go to its calls for adjoiners on the north.

"That, as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official courses and distances from their northern line, or from the Rockefeller maple corner."

To which point the court gave the following answer and direction to the jury:

"11th point. This point is affirmed."

The facts proved which make this answer error are—

1st. Evidence was offered showing that the William Elliott was one of a block of surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham tracts, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person. (See printed Record, pages 66, 67, and 68.)

2d. There was proof of original marks upon the ground on the northern line of the Ebenezer Branham, one of the surveys of the block, sufficient to establish the northern line of that tract. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, and 107 of the Record; see also testimony of H. S. Boyer, pages 107 and 108; see also testimony of George W. West, pages 108 and 109 of the Record, and testimony of M. B. Trescott, pages 68, 69, 74, and 76; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49, 50, and 52.)

3d. There was also proof of two original marked line trees on the north line of the Lewis Walker survey, another tract of the block. (See testimony of M. B. Trescott, pages 79, 80, and 81 of the Record.) Other surveyors testified to the same effect. (See page 103 of the Record.)

4th. There was also a proof of an original chesnut oak line tree on the northern line of the Ebenezer Branham survey, south of the Samuel Lobdil survey. (See page 103 of the record.) Other surveyors for the defendant testified to the same effect (page 107).

Fourteenth Specification of Error.

The court erred in answering the defendant's fifth point, contained in the fifteenth bill of exceptions (page 202 of the Record), which point and answer are as follows:

"5th. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor, and in endeavoring to ascertain the proper location the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believe that the said two surveys which call for the Lobdil were located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdil, such fact would be of importance in ascertaining the exact location of the Lobdil and of the block of surveys of which this is a part."

To which point the court gave the following answer and direction to the jury:

"5th point. The jury may take into consideration the acts of the deputy surveyor mentioned in this point in determining the question whether or not the chestnut oak and the gums are trees marked by the surveyor in 1793 (as the defendant claims) to define the southern line of the block of eleven surveys, the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the facts upon which this point is based

would be of no importance in determining the controversy in this case."

The facts proved which make this answer error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner," called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys, is well established on the ground by the testimony of both plaintiff's and defendant's surveyors, and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well-recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of those surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record); an official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys composed of the William Elliott, Lewis Walker,

William Shannon, Nathaniel Brown, and Ebenezer Branham also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time and owned by one person. (See Record, pages 66, 67, and 68; also official connected drafts in evidence, pages 67 and 68.)

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches. (See pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence, page 68; shown also on maps Nos. 2 and 3 of appendix.)

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant he returned the Samuel Lobdil, giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record).

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its adjoining on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78.) To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time as the Brush Valley block of survey. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north line of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

9th. There was also proof tending to show that the location of the Branham and the Martin surveys by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and

calls tended to show the survey, and that the deputy surveyor, in 1793, located the southern line of the Brush Valley block of eleven surveys south of their official distance.

(See separate official copies of these returns of survey, in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft, in evidence, page 68, and maps No. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys); and

11th. There was testimony of skillful and experienced surveyors tending to show from their experience as surveyors work done on the ground and monuments found; that the dividing line between the plaintiff's and defendant's blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793.

See reasons given by M. B. Trescott, (page 85 of Record.) To the same effect was the testimony of H. S. Boyer, Geo. W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown, (page 103.)

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor, who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, in the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp, in the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See Record, pages 71, 72, 79, and 110.)

Fifteenth Specification of Error.

The court erred in answering the defendant's seventh point, contained in sixteenth bill of exceptions (page 203 of Record), which point and answer are as follows:

"7th. If the jury believe that the William Elliott is one of a block of surveys known as the La Fevre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks, or monuments corresponding with the date of survey of this block on the northern line of any of these surveys would be monuments for the northern line of the Wil-

liam Elliott survey and establish the northern line of the William Elliott."

To which point the court gave the following answer and direction to the jury:

"7th point. This point as a whole is refused. The William Elliott calls on the north for the Charlotte Ruston and Mary Meyers and others, members of the Brush Valley block, and no marks on the ground have been found to limit that call; moreover, the official return of the Lewis Walker survey, one of the La Fevre block, which adjoins the William Elliott on the east, adopts the Reynolds-Billington maple as a northern monument for the Walker. As we have already intructed the jury in our general charge, wherever the true line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go."

The facts proved which make this answer error are—

1st. Evidence was offered showing that the William Elliott was one of a block of surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham tracts, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person. (See printed Record, pages 66, 67, and 68.)

2d. There was proof of original marks upon the ground on the northern line of the Ebenezer Branham, one of the surveys of the block, sufficient to establish the northern line of that tract. (See testimony of A. J. Duffy and A. K. White, pages 103, 104, 105, 106, and 107 of the Record; see also testimony of H. S. Boyer, pages 107, and 108; see also testimony of George W. West, pages 108 and 109 of the Record, and testimony of M. B. Trescott, pages 68, 69, 74, and 76; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49, 50, and 52.)

3d. There was also proof of two original marked line trees on the north line of the Lewis Walker survey, another tract of the block. (See testimony of M. B. Trescott, pages 79, 80, and 81 of the Record.) Other surveyors testified to the same effect. (See page 103 of the Record.)

4th. There was also proof of an original chestnut oak line tree on the northern line of the Ebenezer Branham survey, south of the Samuel Lobdil survey. (See page 103 of record.) Other surveyors for the defendant testified to the same effect (page 107).

Sixteenth Specification of Error.

The court erred in answering the defendant's eighth point, contained in the seventeenth bill of exceptions (page 204 of Record), which point and answer are as follows:

"8th. If the jury believe the testimony of the defendant's surveyors that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established, and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that course would be monuments fixing the whole northern line of the La Fevre block, and a line run westward from the post by a pine corner by the official courses and distances of the northern line of said block by these trees would establish the northern line of the William Elliott survey."

To which point the court gave the following answer and direction to the jury:

"8th point. This point is refused."

The facts proved which make this answer error are—

1st. Evidence was offered showing that the William Elliott was one of a block of surveys composed of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham tracts, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person. (See printed Record, pages 66, 67, and 68.)

2d. There was proof of original marks upon the ground on the northern line of the Ebenezer Branham, one of the surveys of the block, sufficient to establish the northern line of that tract. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, and 107 of the Record; see also testimony of H. S. Boyer, pages 107 and 108; see also testimony of George W. West, pages 108 and 109 of the Record, and testimony of M. B. Trescott, pages 68, 69, 74, and 76; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49, 50, and 52.)

3d. There was also proof of two original marked line trees on the north line of the Lewis Walker survey, another tract of the block. (See testimony of M. B. Trescott, pages 79, 80, and 81 of the Record.) Other surveyors testified to the same effect. (See page 103 of the Record.)

4th. There was also a proof of an original chesnut oak line tree on the northern line of the Ebenezer Branham survey, south of the Samuel Lobdil survey. (See page 103 of the record.) Other surveyors for the defendant testified to the same effect (page 107).

Seventeenth Specification of Error.

The court erred in answering the defendant's tenth point, contained in the eighteenth specification of error (page 205 of Record), which point and answer are as follows:

"10th point. That any monument on the ground called for and adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and in the present case, if the jury believe that any part of the southern line of the block of eleven or Brush Valley block was run by the deputy surveyor, either from or to intersect the post by a pine as a mark indicating the location of the said southern line, the said post by a pine would be a monument which would control the mere evidence of official distances."

To which point the court gave the following answer and direction to the jury:

"10th point. As a naked proposition, this point is correct and it is affirmed; but the jury will understand from our general charge that if they find that the chestnut oak and gums upon which the defendant relies are not trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block the post by the pine would have no control in the location of that block."

The facts proved which make this answer error are—

1st. There was proof of original marks upon the ground. The "post by a pine corner" called for as the southwest corner of the Francis West and the southeast corner of the Richard Martin and called for as a monument in the northern line of the Ebenezer Branham surveys is well established on the ground by the testimony of both plaintiff's and defendant's surveyors and is undisputed. (See testimony of George W. West, pages 108 and 109 of Record.)

"Q. When were you first at the 'post by the pine,' the southwest corner of the Francis West and the southeast corner of the Richard Martin?

"A. In 1852.

"Q. Was the pine tree a witness to the post corner standing there?

"A. It was, and had been blocked a short time before I went there.

"Q. What did the pine point to?

"A. It pointed to the date of the Francis West survey.

"Q. There is, then, as I understand you, no doubt about the location of the 'post by a pine corner?'

"A. I have none."

(See testimony of M. B. Trescott, pages 68 and 69 of Record.)

To the same effect is the testimony of A. J. Guffy (page 103) and other surveyors (page 107 of Record).

See also testimony of A. B. Cochran, plaintiff's surveyor, to the effect that this corner was undisputed and a well recognized corner (page 44 of Record).

There was also proof that on the line dividing the Richard Martin and Ebenezer Branham surveys, in the course of said line, there were original marked trees bearing the date of one or the other of these surveys. (See testimony of A. J. Guffy and A. K. White, pages 103, 104, 105, 106, 107 of the Record; also testimony of H. S. Boyer, pages 107 and 108; Geo. W. West, pages 108 and 109; M. B. Trescott, pages 68, 69, 74, 75, and 76 of Record; see also testimony of A. B. Cochran, plaintiff's surveyor, pages 49 and 50 and 52; see also maps showing the location of these tracts and trees found and official connected maps from the office of the secretary of internal affairs, in evidence, pages 67 and 68.)

2d. The eleven surveys in the names of Daniel Reese, Charlot Ruston, Mary Myers, John Reynolds, Thomas Billinger, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil constitute a block of surveys, all having been applied for at the same time, surveyed at the same time, and owned by one person (pages 61, 62, 63, 64, and 65 of Record); and official connected draft of these and surrounding tracts in evidence (pages 67 and 68 of Record).

The six surveys, in names of the William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham, also compose a block of surveys, having been applied for at the same time; warrants issued the same day, surveyed at the same time, and owned by one person (see Record, pages 66, 67, and 68); also official connected drafts in evidence (pages 67 and 68).

5th. There was proof that the Richard Martin and Francis West surveys both call for a common corner, the "post by a pine," and the same corner is called for in the official return of the Ebenezer Branham. The Richard Martin calls for the Francis West on the east and the Samuel Lobdil on the west, and to adjoin the Lobdil for its whole length, 320 perches (see pages 66 for return of survey); copy of survey on map, No. 6, or last map in appendix, and certified official connected draft in evidence (page 68); shown also on maps Nos. 2 and 3 of appendix.

6th. There was proof that the block of eleven surveys and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office on the 28th of February, 1794, stating that its western line was 320 rods in length, and three days after he had exhausted his power over this warrant returned the Samuel Lobdil,

giving it the same course and length of line. (See certified list of William Gray's returns, page 64 of Record.)

7th. There was proof showing that the Francis West survey was well located by original monuments made in 1793, as well as its adjoiner on the east, John Huston. (See testimony of M. B. Trescott, pages 68, 69, 78. To the same effect was the testimony of Geo. W. West, F. W. Moore, and R. F. Brown; also testimony of plaintiff's surveyors, pages 44, 45, and 46 of Record.)

8th. There was proof that the northern line of the Richard Martin was run on the ground at the same time, as the Brush Valley block of surveys. The Samuel Lobdil shows a dotted line extending eastward from its northeast corner, tending to show that the survey had been continued along the north and south lines of the Richard Martin when the north line of the Lobdil was run. (See separate certified copy of official survey of the Lobdil, in evidence, page 64 of Record, and correct copy of it on last map in appendix; also testimony of M. B. Trescott as to the meaning of these dotted lines, page 78 of Record.)

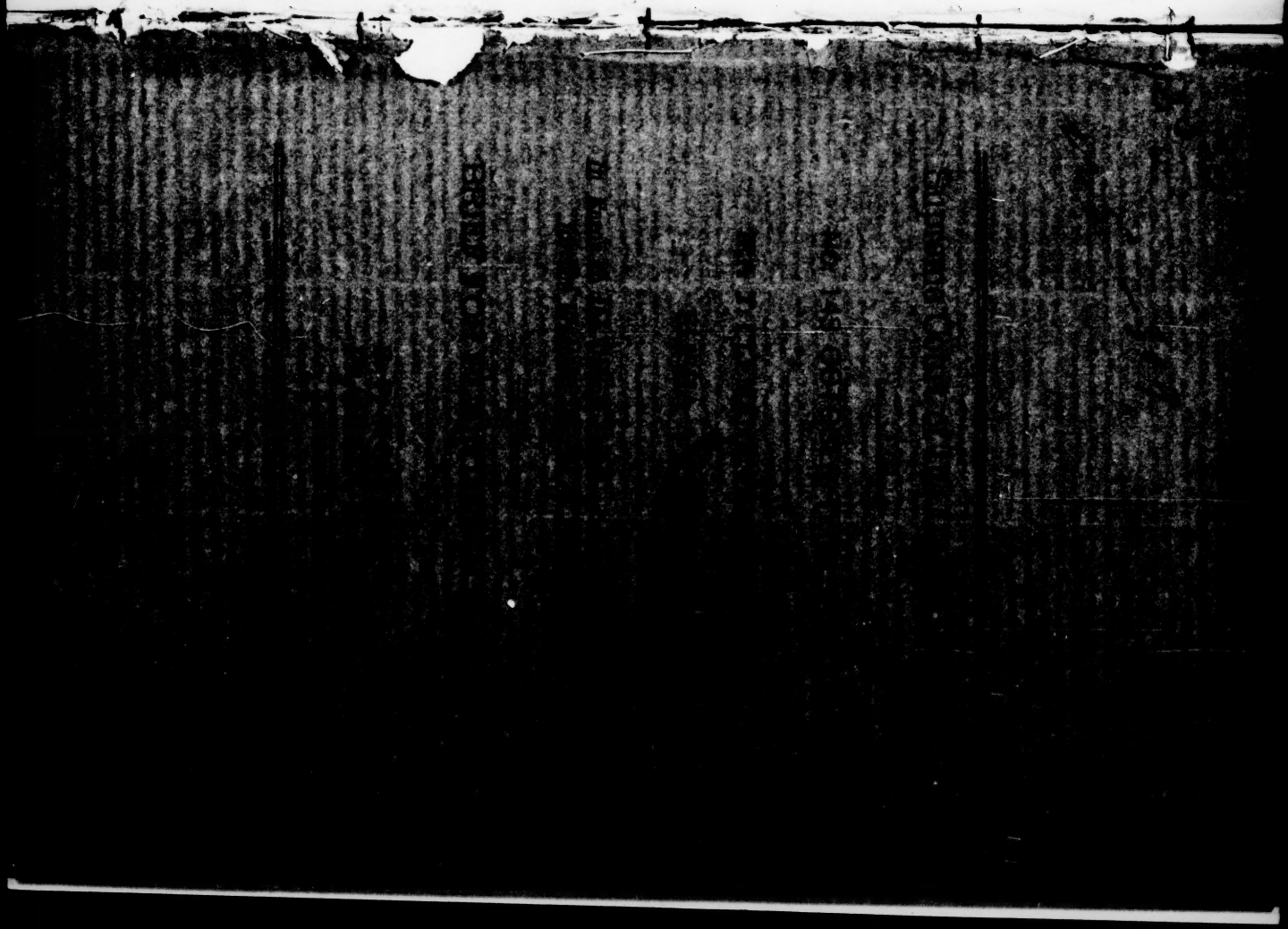
9th. There was also proof tending to show that the location of the Branham and the Martin survey by the "post by a pine" corner and the line trees found between them would conform to the survey as returned into the land office, and that the location claimed by the plaintiff would distort the surveys and change the courses of the lines returned (pages 75 and 76 of Record).

10th. The returns of survey of the Richard Martin, Francis West, John Huston, and Ebenezer Branham by their monuments and calls tended to show the survey; that the deputy surveyor in 1793 located the southern line of the Brush Valley block of eleven surveys south of their official distance. (See separate official copies of these returns of survey in evidence, pages 63 and 64 of Record, copies of which may be found on last map of appendix; also certified official connected draft in evidence, page 66, and maps Nos. 2, 3, and 4 of appendix; see also testimony on pages 103, 104, 105, 106, 107, 108, and 109; also pages 68, 69, 74, 75, and 76; also pages 49, 50, and 52 of the Record; see also maps in evidence, pages 67 and 68, and Nos. 1, 2, 3, 4, and 5 of appendix, showing original monuments on the line between the Martin and Branham surveys; and—

11th. There was testimony of skillful and experienced surveyors tending to show, from their experience as surveyors, work done on the ground and monuments found; that the dividing line between the plaintiff's and defendants' blocks of surveys should be located from the work done by the same deputy surveyor about the same time on the adjoining surveys, and that these monuments pointed out the line run by the deputy surveyor in 1793. (See reasons given by M. B. Trescott, page 85 of Record). To the same effect was the

testimony of H. S. Boyer, George W. West, A. J. Guffy, James Caldwell, T. W. Moore, and R. F. Brown (page 105).

12th. The plaintiff had himself given evidence tending to prove that Henry Donnel was the assistant of Wm. Gray, deputy surveyor, who located these lands (page 60 of Record), and it was proved on the trial that the same Henry Donnel ran the disputed line in 1814, and declared that the maple corner between the Billington and Reynolds, on the north line of the Lewis Walker, was where the defendant claims the corner to have been made by Gray, near the swamp on the line run westward from the "post by a pine" corner (see testimony of John Fisher, pages 109, 110, 150, 151, 152, 153, and 154 of Record), and trees are found bearing the date of the survey made by Donnel in 1814 on the lines Fisher says he ran at that time. (See record, pages 71, 72, 79, and 110.)



Supreme Court of the United States.

No. 143 OCTOBER TERM, 1887.

IRA T. CLEMENT, Plaintiff in Error.

vs.

ELISHA A. PACKER.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment, brought to recover about one hundred and twenty acres of land, which the plaintiff below claimed was a part of a tract surveyed October 22, 1794, in pursuance of a warrant to William Elliott, dated the 26th day of November, 1793.

The William Elliott tract is one of a block of surveys known as the "La Fevre Lands." The tracts composing this block are, the Ebenezer Branham, Nathaniel Brown, William Shannon, Lewis Walker and William Elliott, all of which were surveyed on the 21st and 22d days of October, 1794, on warrants dated November 26, 1793.

They were owned by the same person, and constitute in law a complete block of surveys, as shown on map No. 1, hereto attached.

The defendant below claimed that the land in dispute was embraced within the lines of two tracts of land surveyed on the 2d day of October, 1793, on warrants dated June 11, 1793, one to Charlotte Ruston and the other to Mary Myers. These two tracts are part of a block of eleven surveys, known as the "Brush Valley Lands," or "Asylum Lands." This block is composed of tracts in the warrantee names of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean and Samuel Lobdil. They were all surveyed on the 2d and 3d days of October, 1793, on warrants dated June 11, 1793. They were owned by the same person and constituted one block of surveys, shown on map No. 2.

The question is, where is the true location of the line dividing these two blocks of surveys, or rather for the purpose of this case where is the northern line of the La Fevre block, as plaintiff claimed the disputed land to be within the lines of one of the tracts of this block.

The same Deputy Surveyor, William Gray, located both blocks of surveys and returned them into the Land Office. He had all the warrants in his hands at the same time, as well as the warrants surrounding both blocks and returned none of the warrants into the Land Office until after he had completed his work on the ground.

The northern line of the "Brush Valley Block" was well marked upon the ground in 1793. So was the northern line of the lands south of the "La Fevre Block." The La Fevre, of which the Elliott was a part, was evidently placed between the Brush Valley Block, and the surveys on the south, to appropriate vacant land which the Deputy Surveyor supposed lay between them, from his work upon the ground within a few months prior to their location.

The warrants for the Brush Valley block are all dated June 11, 1793, and the surveys were made October 2d and 3d, 1793.

The warrants for the lands south of the "La Fevre Block," were dated May 10, 1793. The surveys were all made on the 17th, 18th and 19th of October, 1793. All the surveys in this neighborhood were made by Henry Donnel, a deputy under William Gray. A few days before he went on the ground to locate the Brush Valley block of surveys, he had been there, and had surveyed and located a tract of land for Francis West, by virtue of a warrant dated January 3, 1793. This survey was well marked on the ground by him, and is located but a short distance east of the Brush Valley block. It was his evident intention to connect the Brush Valley block with this tract, as it was his only guide in that neighborhood, and as he had surveyed it upon the ground but a few days previous, its location must have been well known to him.

After locating the Brush Valley block, there was left a vacancy between this block and the Francis West survey. A warrant was obtained for this on the 22d of January, 1794, in the name of Richard Martin, and in pursuance of this the same surveyor, on the 23d of February, 1794, surveyed the Richard Martin, calling to adjoin the Francis West on the east and Samuel Lobdil on the west. The Surveyor either actually located this tract on the ground on the 23d of February, 1794, or ran the lines at the time of the location of the Brush Valley block. Its northern and eastern lines were well marked on the ground, and in its southern line, in the official course, was found a well marked line-tree bearing the same date. As a tree marked in October, 1793, or February, 1794, would register the same number of growths, it is impossible to tell at which time the trees were marked by the surveyor.

Map No. 3, hereto attached, shows the relative locations of these two blocks, in relation to each other, the Richard Martin, Francis West and other adjoining surveys.

The Richard Martin survey, at its southeast corner, calls

for a post by a pine, which is the well known and undisputed southwest corner of the Francis West survey. This corner is also called for in the northern line of the Ebenezer Branham. This corner and five well marked line-trees in the course of the line between the Ebenezer Branham, and Richard Martin, the defendant's counsel contended, established the northern line of the Ebenezer Branham and the southern line of the Richard Martin, beyond doubt, and fixed the northern line of the whole "La Fevre Block" of surveys, of which the Branham was the leading warrant. That if the northern line of the Ebenezer Branham could go no further north than these line-trees in the course of the common line between these surveys, then the whole northern line of the plaintiff's block would be determined by running the official courses of the northern lines of the tracts composing this block.

The plaintiff's counsel contended, that these monuments, although made by the same Deputy Surveyor about the same time, could have no influence in determining the line between the two blocks of surveys, and that the defendant could come no further south than the official distance from the northern line of the Brush Valley block.

The warrants for the eleven Brush Valley tracts, and the Richard Martin, were all in the hands of the Deputy Surveyor at the same time, and he returned the Richard Martin into the Land Office three days before he returned the Brush Valley block.

At the time these surveys were made Northumberland was a very large county, and William Gray had five regular deputies, one of whom was Henry Donnel, and his district embraced these surveys, and the work on the ground was undoubtedly done by him.

In 1814 Henry Donnel ran one of the cross lines of the Brush Valley block to the north line of the "La Fevre Block," and according to the testimony of John Fisher, who was along with him at that time, he fixed the lines dividing these

two blocks at the same place that the defendant now claims to be the true location on the ground.

If the northern line of the plaintiff's block could be established, as claimed by him, at the end of the official distance of the Brush Valley block, measured from the northern line of that block it would be increased in quantity largely. The narrow neck of the Walker survey would be about five times its official width.

During the months of September, October and November, 1793, Henry Donnel, who was a deputy under William Gray, the deputy surveyor, was engaged in locating surveys in this neighborhood. September 10, 1793, he ran the lines of the Francis West; October 2nd and 3rd, 1793, he located the Brush Valley block; October 17, 1793, he located the surveys south of the La Favre block and marked them on the ground; February 22, 1794, he located and marked the Richard Martin; Oc ober 21st and 22d, 1794, he located the La Fevre block.

The first work done by him was on the Francis West, which he ran and marked well upon the ground.

The Deputy surveyor had all these warrants in his hands at the same time and returned the Richard Martin into the Land Office three days before he did the Brush Valley block, as will appear from certified copies of the returns, as follows:

OFFER.—Certified copy of return of William Gray, Deputy Surveyor, showing that the Richard Martin was returned February 28, 1794, and that the eleven tracts were returned March 3, 1794, as follows:

Among the Deputy Surveyor's Lists of Returns of surveys made to the office of the Surveyor General of Pennsylvania are the following named, to wit:

WHEN RET'RN'D	WARRANTEES.	ACRES	BY WHOM RETRN'D	WHERE ENTR'D.	PAGE.
1794, Febr'y 28.	Richard Martin.	419¾	Wm Gray	Book B	110
1794, March 3.	Samuel Lobdil..	411	" "	" "	111
" " "	Joshua Bean....	429¾	" "	" "	"
" " "	John Young....	406¼	" "	" "	"
" " "	Mary Ruston...	380¼	" "	" "	"
" " "	Thomas Ruston.	418½	" "	" "	"
" " "	Mary Ruston...	434½	" "	" "	"
" " "	Thos. Billington	411	" "	" "	"
" " "	John Reynolds..	444½	" "	" "	"
" " "	Mary Myers....	443¼	" "	" "	"
" " "	Charlot Ruston.	426¾	" "	" "	"
" " "	Daniel Reese...	380¼	" "	" "	"

The deputy who had been on the ground certainly knew the exact location of the Richard Martin, and returned, under oath, to the surveyor General that the western line of the Richard Martin was three hundred and twenty perches long, and three days after returned the Samuel Lobdil, stating that its eastern line was three hundred and twenty perches long, and that a straight line from the "post by a pine" corner to the southwest corner to the Lobdil, bounded the two tracts on the south—and this line strikes in its exact official course the "line tree"—line trees between the Branham and the Martin.

As stated, the whole northern line of the block is well marked on the ground. It is on the top of a monntain, and the offsets in the line were evidently made by the surveyor to enable him to keep on top of the mountain.

There is also a well marked line between the Thomas Billington and the John Reynolds, two of the Brush Valley block.

There was some discrepancy in the testimony of the surveyors as to the date to which the blocked line trees counted. All the plaintiff's surveyors making them count to 1793, the same as the northern line of the whole block. Part of the defendant's surveyors contended that they only counted

to 1794. The plaintiff's position was that this line was run at the same time, and that one of his surveyors, David Rockefeller, had found the maple corner called for in the official surveys of the Reynolds and Billington.

The date of the line may be conceded as claimed, but there was a dispute as to the maple sprouts ever having been the corner of these two tracts, or where it once stood.

The officials call for a *small maple* corner in 1793. This maple the defendant's surveyors contended was near a swamp about forty rods further south, and that the maple sprouts which David Rockefeller marked as this corner by piling stones around it, had never been a corner, and was not in the proper location. (1), it is short of the official distance about eight rods; (2), it is more than one-half a degree out of the course of the line, and six or seven rods west of where it should be; (3), the alleged witness to the corner is some ten rods away, and according to the testimony of defendant's witnesses never had been marked with an axe, but had been scarred by another tree falling against it. (4), because at the exact official distance in the exact course of the line there stood a pine tree about two hundred years old, which the surveyor would have marked instead of a *small maple*, seven rods out of the line and eight rods short of the official distance; (5), all the other lines run on the ground overrun in length considerably, and these sprouts are eight rods short of the official distance; (6), the sprouts themselves show that they never could have been a corner or the outgrowth of the small maple, being merely stools, such as are abundant on the mountain side, caused by fires on the mountain.

William Gray, who was deputy surveyor of the county in 1793, had five regular deputies under him, one of whom was Henry Donnel, who had charge of that part of the county south and east of the Susquehanna river, and particularly of the coal regions.

In 1814, John Fisher was along with Henry Donnel in surveying these lands, and when he run the line between the

Billington and Reynolds. Donnel then fixed the maple corner some forty rods south, near the swamp, where the defendant has always contended it should be, and in the line dividing the Brush Valley block and the "La Favre Block," run as the defendant below contended it should by taking the official courses and distances from the "post by a pine" and the line trees between the Branham and the Martin. In his testimony Mr. Fisher said: "I think Henry Donnel said it was located there about twenty-three years before."

No stronger evidence could be given than this as to where the surveyor located the southern line of the Brush Valley tract at the time they were located in 1793.

The Court below ruled out the testimony of John Fisher as to what the deputy surveyor said while re-surveying the same lands he actually located a few years before, which is complained of as error, (pages 181 to 189, inclusive, of the record.) The defendant's counsel offered in evidence the patents for the tracts composing the plaintiff's block as evidence bearing on the question of location and to show the quantity of land granted by the Commonwealth, in pursuance of the several surveys. They were objected to, and rejected by the Court, which formed the second bill of exceptions (pages 179 and 180 of the record).

The remaining specifications of error, on pages 179 to page 206 inclusive relate to errors of the Court in their charge to the jury and answers to the plaintiff's and defendant's points, in which it is contended that the Court committed manifest error—

1st.—In holding that wherever the true southern line of the Brush Valley block may be, to that line the William Elliott, calling for it, must go; thus in effect charging the jury that a call for a tract in a block of surveys controlled the original monuments on the ground made for the block.

2d.—In charging the jury in answer to the plaintiff's eleventh point, (page 201,) that there were no marks made for the

William Elliott in 1794, and therefore the Elliott must go to to its northern calls for the Charlotte Ruston, Mary Myers and others of the Brush Valley block, and embrace the land in dispute by establishing the northern lines of the tracts called for at the end of the official distance measured from their north lines, thus withdrawing the evidence of work done on the ground by the same surveyor about the same time on adjoining surveys, and holding that the undisputed monuments on the north line ot one of the same block with the Elliott were not monuments for the north line of the Elliott, in opposition to one of the best established principles of land law of Pennsylvania governing the location of blocks ot surveys.

3d.—In charging the jury in answering the defendant's seventh and eighth points (pages 203–204 of the record) and in the general charge, that monuments on the northern line of any one of the surveys composing the plaintiff's block, were not monuments for the William Elliott survey, thus withdrawing the evidence of monuments on the northern line of the Branham, from the consideration of the jury in determining the location of the northern line of the Elliott, and overturning the well established principles of law relating to the location of blocks.

"That when surveys are made and returned into the Land Office in blocks, they are to be located on the ground in blocks;" and

"That where several tracts are surveyed and returned into the Land Office as one block, they are to be considered as one tract;" and

"That marks on any part of the block belong to each tract in the block."

4th.—In charging the jury, that unless they found certain trees were marked by the surveyor in 1793, claimed by the defendant, then the work of the same Deputy Surveyor on adjoining tracts of land could have no effect in determining the location of the line. That is, that such work of the

Deputy Surveyor was of some value if not needed, but of no account if it was.

5th.—In charging the jury, that the opinions of practical surveyors as to the date when trees were marked was mere speculation and worthless.

SPECIFICATIONS OF ERROR.

First.—The Court erred in rejecting the evidence contained in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the Un ted States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the Circuit Court the counsel for the said defendant, to maintain the issue on the part of the said defendant, made the following offer of evidence:

"Counsel for defendant offer in evidence the patents to Peter Graul for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown and Ebenezer Branham surveys, being the La Fevre block, William Elliott, dated

the 13th of April, 1797; the Lewis Walker, the 12th of April, 1797; the Nathaniel Brown, the 13th day of April, 1797; the Ebenezer Branham, the 17th day of April, 1797, and the William Shannon, the 13th day of April, 1797, for the purpose of location and showing that the Commonwealth confirmed the location of the said surveys as a block by granting patents to one of them, and also for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys," and prayed the Court that the same might be read and given in evidence to the said jurors; to which the counsel for the plaintiff objected as follows:

"Counsel for the plaintiff object upon the ground that he claims under Dr. Ruston, who, by virtue of the payment of the purchase money for several tracts of land, known as the La Fevre lands, was the owner thereof; that his title gained with the inception of the parts from the Commonwealth location of lands upon the ground in 1793; the patent or patents appeared to have been issued to a stranger and show no connection between himself and the warrantee or Dr. Ruston, and therefore the patent is not evidence as aginst Dr. Ruston or those claiming under him for any purpose whatever. The patent is not evidence upon the subject of location in any event, the question of location vesting in the evinence in connection with the official survey itself. The patent is a completion of the title above and not necessarily part of the last, and definitely fixes the quantity of land intended to be conveyed by the Commonwealth when such land is granted either to the warrantee or the party holding the right, title, and interest to the patent."

The Court sustained the exceptions and rejected the evidence.

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said ruling and opinion of the said Court; and thereupon the Judges of

the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit; That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Second.—The Court erred in rejecting the evidence contained in the following bill of exceptions: p 157

In the Circuit Court of the United States for the Western District of the State of Pennsylvania. November Term, 1881.

Elisha A. Packer
vs.
Ira T. Clement. } No. 19.

Ejectment.

Upon the trial of the issue in this case between the said parties before a jury duly empanelled at November sessions, 1883, of said court, held at Pittsburgh, before Hon. William McKennan and Hon. M. W. Acheson, the defendant, by his counsel, made the following offer in evidence:

"Counsel for defendant offer in evidence deposition of John Fisher, taken on rules to take depositions in cases numbered 394, 395, 396 and 397, of January term, 1874, in the common pleas of Northumberland county. and 103, of November term, 1872, of the same county, and agreed to be read in all the cases, subject to exceptions as to incompetency (*pro ut*

deposition hereto attached and made part of this bill), it being admitted by both parties that John Fisher is dead," and prayed that the same might be given and read in evidence to the said jury; to which the counsel for the plaintiff objected as follows:

Counsel for plaintiff object to the paper offered as the deposition which purports to be a deposition taken under an agreement between counsel to be read on the trial of certain cases then pending in the Court of Common Pleas of Northumberland county, wherein Ira T. Clement was plaintiff and the Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of the Court; that the several cases referred to in deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials and it was never competent to meet it under the rules of Court, John Fisher being at the time living and able to attend Court and did attend Court, and his testimony was taken in those trials and it was printed in the proper books, from which the testimony of deceased witnesses have been read in the trial of this case.

And plaintiff further objects for the reason that it was taken between other parties, and that he is neither privy nor party to the suit in which the deposition was taken, and that he claimed, by title derived at sheriff's sale, a legal process, a portion of all the property that was claimed by the Northumberland Coal Company, the party to the former action.

And, further, that the deposition on its face shows that the declarations which are offered to be proven by the deposition were not a part of any *res gesta* and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declarations relate, but they were of past matter of which there is no evidence that the declarant had any knowledge.

Plaintiff further objects that the declarations referred to in the deposition were made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act of which there is no evidence of which the declarant had any knowledge other than his own declaration.

"It is admitted that the deposition of John Fisher, filed in the Court of Common Pleas of Northumberland county, of No. 394, of January term, 1874, in the case of Ira T. Clement vs. The Northumberland Coal Company, of June 12, 1878, *that it* was taken May 13, 1878, after the verdict of the jury in that case and after the witnesses had testified at the trial of the case."

DEPOSITION.

John Fisher produced and sworn on the part of the plaintiff:

BY WITNESS:—I reside in Shamokin township; lived there since 1812; lived near the line of Columbia county; line divided the farm I lived upon. I am between 75 and 78 years of age. I was born in 1799. I will be 79 years old next September. My father's name was Henry Fisher. My father never owned any of the Brush Valley lands. I owned the undivided one-half of eight tracts. I was with Henry Donnel when he run part of these lines, in August or September, in 1815 or '16. He run them the same year I carried the mail. It was between 1814 and 1816. I know it was the time I was carrying the mail. I commenced carrying mail in 1815. He started to survey at that time at the northwest corner of the Daniel Reese survey, in sight of my father's house. Then ran from there along the top of the mountain eastward to the corner of the Thomas Billington. Then we ran south between the Billington and Reynolds south to the stone corner among maple sprouts over near the swamp. At that point we found a stone corner The timber there is very thin. There was no timber there at that time. It is very open; clear of timber. This is fifty or sixty rods south of Rocke-

feller's sprouts, where we found this stone corner. He started at the Billington corner and run south on the line between the Billington and Reynolds, past the Rockefeller sprouts to a point fifty or sixty rods beyond where we found the stone corner with the maple sprouts around, at the north side of a swamp. This corner looked as though it had been filled up there for some time. We found two line trees on this cross-line between the Billington and the Reynolds; one was a hemlock; one a pine. William Leatherland and I were with Henry Donnel at that time. I carried chain. I was well acquainted with Henry Donnel. I knew him for four years before this. He boarded at my father's when he laid out a town for Tilghman. He was a surveyor. When he surveyed in that neighborhood he stopped with my father. He frequently surveyed there. He done a good deal of surveying in that country. He was at that time the principle surveyor of lands—done most of it. I had a conversation with him at that time about this line.

[Plaintiff proposes to ask the question what the conversation was he had with Henry Donnel at the time he was surveying these lines in 1815 relative to the location of these tracts of land—this corner—and work done by him, personally by him, twenty-one or twenty-two years before when he located the Brush Valley surveys, to be followed by proof that Henry Donnel is dead.

For the purpose—

First.—As hearsay evidence of the boundary of these tracts and location of their lines.

Second.—For the purpose of showing where the southwest corner of the Billington and the southeast corner of the Reynolds were originally located on the ground in 1793.

Defendants object—

First.—It is not proposed to show that Henry Donnel was

the surveyor who run the lines in 1793 and who located the lands which the plaintiff calls the Brush Valley lands, and because any statements by Henry Donnel would not be evidence for such purpose.

Second.--Because it is not proposed to show that Henry Donnel was present when the lands were located; that the testimony is not competent hearsay testimony of boundary, and not evidence for the purpose offered.

Third.--Because it is irrelevant.]

By Witness:

Mr. Donnel said at that time, while there at that corner, that twenty-one or twenty-two years ago "we located these warrants." When we got to this corner Mr. Donnel said, "Here is the corner," pointing to it. I saw that corner one hundred or one hundred and fifty times afterwards. I cannot say how often. I saw it ten or fifteen times every fall for thirty or forty years. I saw it while out hunting and out gathering berries. We could not get through the swamp, and was obliged to get around it on this side. I saw it sometimes every day. I hunted there because it was the best hunting ground there was on the mountain; it was more broken up. I hunted deer generally—any wild game we came across. We had a deer lick at the head of this swamp. There was a pine road led through there; went through there to hunt pine knots. There was an ore road run through there. I passed this corner many times with a horse to take deer home; we went around this corner to strike the old ore road. There is a spring near this corner—forms a little run there at the head of the swamp; swamp covers about two acres. I may have seen this corner before the time I was there with Donnel. I think I have seen this corner oftener than any other corner in the wood. [At the time Henry Donnel said he located these warrants, twenty-one or twenty-two years ago, he was surveying the Brush Valley lands. By the Brush Valley lands I mean the Ira T. Clement lands.] My father was agent for these

Brush Valley lands to keep trespassers and shingle-makers off of the lands. From this stone corner we ran west toward the Daniel Reese. We crossed the pike some few rods from the spring, four or five rods from the culvert, south of it. The spring used now is two or two and one-half rods from the culvert and north of the old spring; they both came from the same opening. After we passed that spring we ran west until we crossed the Thompson road to a big water pond; then is was night. Next morning I went off with the mail and my brother went along. On the next Monday, at noon, I met them, and we started at the J. Adam Gilger line and run east some forty or fifty rods; then run north one hundred or one hundred and twenty rods, crossed Roaring creek and cornered on the bank at a little ash; then run west about forty or fifty rods to a small stone corner and small black oak in it; then went north to the northwest corner of the Dan Reese, the place of beginning; at the southwest corner of the Reese we cut out the Gilger interference. The Daniel Reese, as laid down, interferes with the Gilger; the Gilger was the oldest warrant. The Gilger interference is in the valley. I know where the Gilger lines are as well as I know where this house stands. I was with Donnel when he run the Gilger interference. I know the maple and the ash corners. A day or two after I went along with Donnel again. We started at the northwest corner of the Billington and ran east on the top of Little Mountain to the northeast corner of the Thomas Ruston or Mary Ruston, Jr., one or the other; then ran south across the valley up to the top of Big Mountain, in a cove. There was a corner there; it was between the bear path and the Catawissa path. The Catawissa path started out of the pike at the little field on top of the mountain; we always called it the Catawissa path.

The little field is on Green Ridge, which lies between Big Mountain and Mount Carmel borough. This path run on into Roaring Creek valley, northeast from that field, in the direction of Catawissa; it was used for foot travel and horseback

travel; it was an old path. The old settlers of Roaring Creek valley said it was a good path when they went there; they called it the Indian path and sometimes Lee's path; we called it Catawissa path; it was there as long as I knew anything; I can recollect it as early as 1810.

The bear path was not as plain; it was traveled by wild animals principally; it started at Mahanoy and intersected the Catawissa path at the north side of Big Mountain, in the cove where Donnel fixed his corner; he fixed it between these two paths, about twenty or thirty rods east of the Catawissa path. In 1815 it was pretty plain; you could follow it for miles on the mountain.

From the corner in the cove Donnel run west to the little swamp to the corner of the Billington. That is the corner that I speak of as where we had the conversation. That was all the surveying we done at that time on the Brush Valley warrants. I think Donnel went home then, and afterwards went to run the McCall lands. I was taken there with surveyors to point out this corner—the common corner, southeast corner of the Reynolds and southwest corner of the Billington, at the head of the swamp—the Donnel corner. I pointed it out in a space not larger than this room, but could find no trace of it there then, but pointed the spot out where it had been. I showed them within a spot of eight or ten feet. I think W. W. McWilliams, George W. West, H. S. Boyer and Ira T. Clement were along. When Donnel ran from the corner in the cove and from there to the corner at the head of the swamp and from there to the Reese he was running the southern line of the Brush Valley warrants.

These lands were called the "asylum lands," and the "Holland purchase."

Cross-examined.

By Mr. Oram:

It was in August or September, 1815, I was on these lands. I was never on more than once. William Leatherland was

with us; he helped carry chain and kept Donnel's notes. I was born in 1799, 20th day September. I don't know how old I am rightly. I know I am in my 78th year. I was carrying chain for Mr. Donnel. We started at the northwest corner of the Daniel Reese. I know it was the Reese. Donnel had his papers, and I owned the one-half of these eight tracts. We run from that corner east on top of the Little Mountain. We ran up to the Billington tract, then ran across to the little swamp, some three hundred or three hundred and fifty rods across; found two line trees near the creek—a pine and hemlock. I saw them many, many times after Donnel marked them. Donnel did not block them; he did not block any trees. I cannot tell what the course is from the corner of the Billington over to the swamp. I don't remember about the degrees, &c. At the swamp we found a stone corner, stone piled up. All Donnel said was, "This is the corner; here is where we located the warrants twenty-one or twenty-two years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was that line; I knew it was that line. That swamp is fifty or sixty rods from Rockefeller's corner; it is between forty and sixty rods. I owned the undivided one-half of eight surveys of these surveys. I knew where the southern boundary was. I might have said I did not know where the southern boundary was; I don't know any southern boundary only the one Donnel run. I had not sold yet when Rocketeller made the survey for Bellas. I knew there was a southern boundary; only the Donnel and Rockefeller run one. I might have said I did not exactly know where the southern line was. Rockefeller run one which he said was right, and Donnel had run one which he had said was right. There was a stone corner there and maple sprouts. The timber was very scarce there, right where this corner was. From this corner we run west across the pike to a point four or five rods north of the culvert; then run across the Thompson road to a water pond; from there we went home. The next day was Friday, and I went to carry the mail. My

brother then went in my place. I have been over the line between Reynolds and Billington since that time. I was on the line from the swamp to the top of the Little Mountain and back again. W. W. McWilliams, George W. West, Ira T. Clement, and a couple of surveyors were with me that I did not know. This party sent for me to go with them. I may say that I passed that corner one hundred and fifty times after I was there with Donnel. It was in my way there when I hunted every season. I passed and repassed thirty or forty times every season hunting there. I have killed deer there since 1850.

In chief:

Question. Do you think the sprouts had in court ever sustained a tree?

Answer. I have seen the David Rockefeller sprouts in court. I do not think they ever sustained a tree—only a stool.

MR. ORAM objects to this last question and answer—

First.—Because the question is leading.

Second.—Because the witness could not possibly have had any knowledge of the fact about which he questioned.

Third.—Because it is a fact to be found by the jury, and because the answer is a mere conjecture and not evidence of an existing fact.

BY WITNESS:

I have had a good deal of experience in woodcraft. These mountains burn over about once in three years. They burn over as soon as leaves collect. These sprouts exhibited in court were sprouts that sprung up there after a fire had gone over. After a fire has burned over maple sprouts they grow up again and form what is called a stool. I would call these sprouts a stool. On the north side of a dry mountain it is difficult to find a maple tree. They require wetter ground.

There are plenty at the swamp. The ground is wet about the swamp. Swamp covers about two or three acres. Northwest corner of the Daniel Reese is at the point of the mountain; the Donnel lines three or four rods south of the red house.

Re-cross-examined:

Maple stools spring from maple roots. There are not always roots where there are stools that were originally a large tree. I saw these roots in court; they never sustained a tree. This one they had in court only had two roots; there may be some little roots. Stools sometimes form from where the tree burns down; when a tree burns down it sometimes sprouts. I hardly think when a tree burns down that it afterwards grows much. I don't think a maple stool would last for twenty years anywhere.

JOHN FISHER.

Sworn and subscribed before me this thirteenth day of May, A. D. 1878.

Witness my hand and notarial seal.

JAMES K. DAVIS, JR.,
Notary Public.

I hereby certify that the above witness, John Fisher, was duly qualified and examined at the time and place stated in the above caption, in my presence, and that the testimony is as fully and correctly reported as was given.

Witness my hand and seal this thirteenth day of May, 1878.

[SEAL.] JAMES K. DAVIS,
Notary Public.

The Court sustains the objections to the declarations of Henry Donnel and rejects those portions of the depositions embraced in brackets, and at the instance of defendant seals this bill of exceptions this 17th day of December, 1883.

M. W. ACHESON. [SEAL.]

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit; That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Third.—The Court erred in rejecting the evidence contained in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial

of the said case in the Circuit Court the counsel for the said defendant, Ira T. Clement, to maintain the issue on the part of the defendant, made the following offer of testimony:

"Defendant's counsel propose to prove by general reputation among surveyors who are acquainted with the lands in the vicinity of the Brush Valley block and in the neighborhood that Henry Donnel was assistant under the party who made that survey, and who was reputed to have surveyed the lines in Shamokin township, Northumberland county, in 1793 and 1794, to be followed by the testimony of John Fisher that he, Fisher, assisted Henry Donnel to survey the lands in dispute in 1814 and 1815, and while actually engaged in the survey, when at the south end of the line, between the Billington and the Reynolds, that Donnel said at that time, in connection with his running these surveys and when actually engaged thereon, that twenty-one or twenty-two years ago we located these lines; and Mr. Donnel said 'this is the corner,' pointing to the corner as claimed by the defendant;" and prayed the Court there that the same might be given in evidence to said jurors.

To which the counsel for the plaintiff objected as follows:

"Objected to by plaintiff's counsel for the reason stated in the offer next preceeding, and for the additional reason that it is incompetent and irrelevant."

Objections to preceeding offer:

"Counsel for plaintiff object to the paper offered as the deposition which purports to be a deposition taken under agreement between counsel *to read* to be read on the trial of certain cases then pending in the Court of Common Pleas of Northumberland county, wherein Ira T. Clement was plaintiff and the Northumberland Coal Company was defendant; that at the time the deposition was taken John Fisher was living and within the jurisdiction of this Court; that the several

cases referred to in the deposition have been tried and finally disposed of, and that this deposition was never read at any of the trials and it was never competent to meet it under the rules of Court, John Fisher being at the time living and able to attend Court and did attend Court, and his testimony was taken in those trials and printed in the paper books, from which the testimony of deceased witness have been read on this trial; and further objects for the reason that it was taken between other parties, and that he is neither privy nor party to the suit in which the deposition was taken, and that he claims, by title derived at sheriff's sale, a legal process, a portion or all the property that was claimed by the Northumberland Coal Company, the party to the former action; and, further, that the deposition upon its face shows that the declarations which are offered to be proven by the deposition was not part of the *res gesta*, and were not made by a person when in the performance of any official act and not made by him in the performance of any act to which the declaration relates, but they were of past matter of which there is no evidence that the declarant had any knowledge. Plaintiff further objects that the declaration referred to in the deposition now made by a party, not while he was doing an act of which the declaration might be explanatory, but of a past act which —, throw no evidence of which the declarant had any knowledge other than his own declaration."

The Court sustained the objections and rejected the evidence.

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid ruling and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement whereas by the law of the land the

said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Fourth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the Court charged the jury as follows:

"The William Elliott is one of a block of surveys of the date of October 21st and 22d, 1794, embracing what are known as the Le Fevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands. The

call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds. There is no controversy on the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793. The William Elliott, calling on the south for the last named surveys and on the north for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds, rightfully embraces all the lands within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for the William Elliott may be, to that line it must go."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit; That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Fifth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

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In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial of the said case in the said Circuit Court the Court charged the jury as follows:

"The plaintiff claims that the eleven surveys are to be located from their corners upon the northern line of the block by running out their official courses and distances or from a certain alleged maple corner on the south, the same practical result for the purpose of this case being reached by whichever of these two methods the location is effected.

"The location upon which the defendant insists involves a wide departure from the official returns of survey.

"For example: The official length of the eastern line of the Lobdil is three hundred and twenty rods. The defendant's location lengthens this line thirty-two rods, thus carrying the southern line of the block at its eastern end that much further south.

"At the division line between John Reynolds and Thomas Billington the defendant's location places the southern line of the block sixty-one rods south of the official distances, measuring from the north line. The official length of the western line of the Daniel Reese is three hundred and forty rods. The defendant's location, however, gives this line four hundred and twenty-six rods, or an increase of eighty-six rods, thus carrying the southern line of the block at its western end that much further south.

"If the true southern line of the Brush Valley block is where the defendant locates it the land in controversy belongs to that block and is covered by the Charlotte Ruston and Mary Myers.

"On the other hand, if the southern line of the block is where the plaintiff contends the land in controversy is outside of that block and is within the lines of the William Elliott."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Sixth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —

In error to the Circuit Court of the United States for the Western Circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the Circuit Court the said Court charged the jury as follows:

"The plaintiff has brought into Court and exhibited to you a large section of the trunk of this gum, being the part from which the defendant's surveyors took their block A number of expert witnesses have been examined by the plaintiff in respect to this exhibit. They say it is impossible to count this gum. They further state they find no old axe mark on this exhibit and no evidence of any. Several of these witnesses testify that they saw this gum when standing and carefully examined it before it was blocked by Mr. Trescott and his party, and they state that it bore no outward evidence of an ancient axe mark. In the midst of this conflicting testimony, which is well calculated to excite at least a doubt both as to the existence of an ancient axe mark on this gum and the date thereof, if any such mark there were, the block which the defendant's surveyor took from the tree

would, it seems to us, have been a most important exhibit—a valuable aid in reaching the truth of the matter.

"But the defendant has not produced it, nor has he given any evidence explanatory of its absence. This block was taken out as late as January last and was in the possession or under the control of the defendant. The withholding it, then, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjects the defendant to a presumption unfavorable to his hypothesis in respect to the character and age of the mark on that tree. The defendant, however, claims to have shown two line trees upon his location of the southern line of the block marked for the survey of 1793. One of these is a chestnut oak at one hundred and forty rods westwardly from the southeast corner of the Samuel Lobdil, which tree was discovered and blocked by A. J. Guffy, one of the defendant's surveyors, in the year 1879, and which block Mr. Guffy, Mr. West, and Mr. Boyer testify counted back to 1793. T. W. Moore, however, one of the defendant's surveyors, says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands. A. K. White, a surveyor, testifies that he counted this block at Lock Haven at a previous trial and that it counted but eighty-two years, which would make it too young by four years for the survey of 1793. To the like effect is the testimony of George B. Strauch and Robert Ammerman, surveyor, whose testimony at the trial at Lock Haven has been read in this case. William T. Mitchell also counted the block at the Lock Haven trial, and he testifies that it counted but eighty-two years. Here there is a direct conflict besween the expert witnesses who have examined the block from the chestnut oak, and the greater number testify that the count fell short of the survey of 1793 by four years The block itself, which, in connection with expert testimony, might have aided you essentially as well as correctly determining whether it bore an ancient axe mark at all (which is

seriously disputed) as in solving the controverted question of age, has not been produced by the defendant, nor its absence accounted for. It was used by him as an exhibit at the Lock Haven trial, and it was then called in question as it is here. Why is it now absent when it so vitally affects the case?"

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the said charge and opinion of the said Court, and thereupon the Judges of the said Court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this writ, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Seventh.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error.
} No. —.

In error to the Circuit Court of the United States for the western district of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial of the said case in the Circuit Court the said Court charged the jury as follows:

"We now direct your attention to another branch of this case. There lies to the east of the Samuel Lobdil and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin; that warrant, issued January 22, 1794, and the survey thereon, according to the official rereturn, was made on the 23rd of February of that year. It was, it would seem, returned into the land office on the 28th of February, 1794, or three days before the return of the survey of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed still later. The Richard Martin, therefore, is a survey junior to the Samuel Lobdil — it- fellow surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdil and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless.

"In the nature of the case it is a matter of pure speculalation on the part of these surveyors. The marks upon the ground in respect to age the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after a lapse of ninety years."

And therefore the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges

of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Eighth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said

case in the said Circuit Court the Court charged the jury as follows:

"The Richard Martin calls on the east for the Francis West, a survey of September 10, 1793, and these two surveys have a common south corner, viz., 'a post by a pine;' but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-seven (37) rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty (250) rods; whereas the actual length is two hundred and eighty-two (282) rods. The south line of the Richard Martin, running from the post by the pine, is north eighty-nine and three-fourths degrees (89°) west three hundred and eight (308) perches to a post. There is evidence tending to show that for the distance of about one hundred and fifty (150) perches from the post by the pine that line is marked on the ground as of the date of the Martin survey; but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdil on the west, and its official west line is three hundred and twenty-six rods long, the same as the Lobdil east line.

"Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin—a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdil and thirty-two (32) rods farther south than the deputy surveyor supposed it was, and is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner thirty-two (32) rods south of the southeast corner of the Samuel Lobdil, as defined by William Gray's official return, and they intend that the Lobdil corner shall be brought

down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdil tract about thirty-two (32) rods further south than its official return locates it; and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block, and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be eighty-six (86) rods.

"To this method of locating the Brush Valley block we cannot assent. The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdil and the other members of the Brush Valley block which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence and may be considered by the jury. in connection with all the other evidence, in determining the question — or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block; but the eleven surveys of that block must then be located from their fixed corners upon the northern line, according to the official courses and distances (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner)."

And thereupon the counsel for Ira T. Clement, the said plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a

bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Ninth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —

In error to the Circuit Court of the United States for the Western Circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the Court charged the jury as follows:

"We now direct your attention to another branch of the

case. There lies to the east of the Samuel Lobdil and adjoining it a tract of land surveyed by William Gray upon a warrant to Richard Martin. That warrant, issued January 22nd, 1794, and the survey thereon, according to the official returns, was made on the 23rd of February of that year it would seem returned into the land office on the 28th of February, 1794, or three days before the return of the surveys of the Brush Valley block. The Richard Martin warrant, however, was issued more than three months after the Brush Valley block had been surveyed, and it was executed a month still later. The Richard Martin, therefore, is a survey junior to the Samuel Lobdil and its fellow-surveys. It is true the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdil and the other warrants of the Brush Valley batch; but in the face of the official returns this opinion is entirely worthless. In the nature of the case it is a matter of pure speculation on the part of the surveyors. The marks upon the ground, in respect to age, the defendant's surveyors admit are consistent with William Gray's return. There is no evidence to contradict the truth of William Gray's returns as regards the dates of these surveys, even were it allowable to impeach them after the lapse of ninety years. The Richard Martin calls on the east for the Francis West, a survey of September 10th, 1793, and these two surveys have a common south corner, viz, a post by a pine, but in order to reach that corner it is necessary to extend the eastern line of the Richard Martin southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty rods, whereas the actual length is two hundred and eighty-two rods. The south line of the Richard Martin, running from the post by the pine, is north eighty-nine and three-fourth degrees west three hundred and eight perches to a post. There — evidence tending to show that for a distance of about one hundred and fifty perches from the post by the pine that line is marked on the ground as of the date of the

Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdil on the west, and its official west line is three hundred and twenty-six rods long, the same as the Lobdil east line. Now, the defendant surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the post by the pine at the southeast corner of the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdil, and thirty-two rods further south than the deputy supposed it was, — is manifest from his mistake just averted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin so as to place its southwest corner thirty-two rods south of the southeast corner of the Samuel Lobdil as defined by William Gray's official return, and they insist that the Lobdil corner shall be brought down from its position as fixed by its official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdil tract about thirty-two rods further south than its official return locates —, and continuing the like process westwardly, they would carry the whole southern line of the Brush Valley block and extend every survey thereof south of the official distance as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached the extension southwardly beyond the official distance would be eighty-six rods. To this method of locating the Brush Valley block we cannot assent. The Richard Martin being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdil and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant might throw some light upon the location of a senior survey which it calls to adjoin. Hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury, in

connection with all the other evidence, in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyors in 1793 to define the southern line for the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line according to the official courses and distances, unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said Court, and thereupon the Judges of the said Court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Tenth.—The Court erred in charging the jury as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western district of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial of the said case in the said Circuit Court the Court charged the jury as follows:

"3d. But should the evidence fail to satisfy the jury that said chestnut oak and gums or any of them are trees marked for the survey of 1793, and should the evidence also fail to satisfy the jury that the true location of the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block must be located from their fixed corners upon the northern — of the block by running out the courses and distances as shown by the official returns of survey and the verdict must be for the plaintiff."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges

of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Eleventh.—The Court erred in answering the plaintiff's second point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney,

and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the sa d Circuit Court the counsel for the plaintiff requested the Court to charge the jury as follows:

"2d. That in the absence of marks upon the ground indicating the southern line of the batch of eleven surveys made in 1793 for these eleven surveys, the eleven surveys must be located from their corners upon the northern line and run out according to their official courses and distances as shown by the official return of survey, and cannot be extended to the south beyond their official distances."

To which point the court gave the following answer and direction to the jury:

"2d point. This point is affirmed."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Twelfth.—The Court erred in answering the plaintiff's fifth point and answer as set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —

In error to the Circuit Court of the United States for the Western Circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same te m, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the counsel for the plaintiff requested the Court to charge the jury as follows:

"5th. It being proved and not disputed in this case that the northern line of the Brush Valley surveys is well marked on the ground, and the corners of said serveys designated by the original marks definately fix the location of each individual survey in the batch, that in the absence of marks to fix definitely the southern boundary the survey of the said batch must be located from the northern lines by running out courses and distances of said surveys according to the official returns of William Gray."

To which point the Court gave the following answer and direction to the jury:

"5th point. This point is affirmed."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said Court, and thereupon the Judges of the said Court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Thirteenth.—The Court erred in answering the plaintiff's eleventh point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western district of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of

the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error, in this, to wit, that on the trial of the said case in the said Circuit Court the counsel for the plaintiff requested the Court to charge the jury as follows:

"11th. That the William Elliott tract of land claimed by the plaintiff was located to adjoin the Sarah Lane, Jesse Brooks, and other older surveys on the south, and called to adjoin the Daniel Reese, Charlotte Ruston, Mary Myers, and John Reynolds, on the north; that, in the absence of marks on the north made for the William Elliott in 1794 by the deputy surveyor, the William Elliott may go to its calls for adjoiners on the north.

"That, as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and therefore the Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official courses and distances from their northern line, or from the Rocketeller maple corner."

To which point the Court gave the following answer and direction to the jury:

"11th point. This point is affirmed."

And thereupon the counsel for the said Ira T. Clement plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said

Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Fourteenth.—The Court erred in answering the defendant's fifth point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the counsel for the defendant requested the Court to charge the jury as follows:

"5th. That the jury should locate the block of which the Charlotte Ruston and Mary Myers are members at the same place at which they were located by the deputy surveyor, and

in endeavoring to ascertain the proper location the jury may take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham surveys, and if the jury believe that the said two surveys which call for the Lobdil were located upon the ground at the place testified by the witnesses, and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdil, such fact would be of importance in ascertaining the exact location of the Lobdil and of the block of surveys of which this is a part."

To which point the Court gave the following answer and direction to the jury:

"5th point, The jury may take into consideration the acts of the deputy surveyor mentioned in this point in determining the question whether or not the chestnut oak and the gums are trees marked by the surveyor in 1793 (as the defendant claims) to define the southern line of the block of eleven surveys, the Brush Valley block, but should the jury find that none of those trees were marked for the survey of 1793, then the facts upon which this point is based would be of no importance in determining the controversy in this case."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be

restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Fifteenth.—The Court erred in answering the defendant's seventh point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —

In error to the Circuit Court of the United States for the Western Circuit of Pennsylvania, of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the counsel for the defendant requested the Court to charge the jury as follows:

"7th. If the jury believe that the William Elliott is one of a block of surveys known as the La Fevre block, of which the Lewis Walker, Nathaniel Brown, and Ebenezer Branham are members, all calling for one common northern line, marks or monuments corresponding with the date of survey of this block on the northern line of any of these surveys would be

monuments for the northern line of the William Elliott survey and establish the northern line of the William Elliott."

To which point the Court gave the following answer and direction to the jury:

"7th point. This point as a whole is refused. The William Elliott calls on the north for the Charlotte Ruston and Mary Myers and others, members of the Brush Valley block, and no marks on the ground have been found to limit that call; moreover, the official return of the Lewis Walker survey, one of the La Fevre block, which adjoins the William Elliott on the east, adopts the Reynold-Billington maple as a northern monument for the Walker. As we have already instructed the jury in our general charge, wherever the true line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the aforesaid charge and opinion of the said Court, and thereupon the Judges of the said Court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement against the said Elisha A. Packer; and the said Ira T. Clement p ays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Sixteenth—The Court erred in answering the defendant's eighth point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the western district of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the Circuit Court, the counsel for the said defendant, Ira T. Clement, requested the Court to charge the jury as follows:

"8th. If the jury believe the testimony of the defendant's surveyors, that the post by a pine corner called for or adopted for the Ebenezer Branham survey is well established and that trees have been found on the northern line of the said Ebenezer Branham in the official course of the northern line of said tract corresponding to its date of survey, then such trees and that course would be monuments fixing the whole northern line of the La Fevre block, and a line run westward from the post by a pine corner by the official courses and distances of

the northern line of said block by these trees would establish the northern line of the William Elliott survey."

To which point the Court gave the following answer and direction to the jury.

"8th point. This point is refused."

And thereupon the counsel for the said Ira T. Clement plaintiff in error, did then and there except to the aforesaid charge and opinion of the said court, and thereupon the judges of the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer and against the said Ira T. Clement, whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer; and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

Seventeenth.—The Court erred in answering the defendant's tenth point, which point and answer are set forth in the following bill of exceptions:

Supreme Court of the United States. October Term, 1884.

Ira T. Clement, Plaintiff in Error,
vs.
Elisha A. Packer, Defendant in Error. } No. —.

In error to the Circuit Court of the United States for the

western circuit of Pennsylvania, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Ira T. Clement, by S. P. Wolverton, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That on the trial of the said case in the said Circuit Court the counsel for the defendant, Ira T. Clement, to maintain the said issue on the part of the defendant, requested the Court to charge the jury as follows:

"10th point. That any monument on the ground called for and adopted by the surveyor, whether such monument adjoins or is annexed to the particular survey or not, is of more value than courses and distances, and in the present case, if the jury believe that any part of the southern line of the block of eleven or Brush Valley block was run by the deputy surveyor either from or to intersect the post by a pine as a mark indicating the location of the said southern line, the said post by a pine would be a monument which would control the mere evidence of official distances"

To which point the Court gave the following answer and direction to the jury:

"10th point. As a naked proposition this point is correct and it is affirmed, but the jury will understand from our general charge that if they find that the chestnut oak and gums upon which the defendant relies are not trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block the post by the pine would have no control in the location of that block."

And thereupon the counsel for the said Ira T. Clement, plaintiff in error, did then and there except to the said charge and opinion of the said court, and thereupon the judges of

the said court, at the request of the said counsel, did seal a bill of exceptions. There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Ira T. Clement; whereas by the law of the land the said judgment ought to have been given for the said Ira T. Clement and against the said Elisha A. Packer, and the said Ira T. Clement prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. P. WOLVERTON,
Attorney for Plaintiff in Error.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

Second and Third Specifications of Error.

These specifications of error relate to the rejection by the Court of a portion of the deposition of John Fisher. The parts rejected are contained within brackets. William Gray was the deputy surveyor for the district embracing these lands. All the warrants in the neighborhood of these tracts were located under his directions and returned by him into the Land Office.

He had five deputies and Henry Donnel was the deputy who located, beyond question, both the Brush Valley and La Fevre blocks of land and the tracts adjoining them. This was shown by the plaintiff's testimony. On the trial he read the deposition of David Rockefeller, taken on a former trial. Mr. Rockefeller had been Deputy Surveyor of Northumberland county for a long time, at an early day, and had control of the official papers which came down from

Gray with the office. As both Gray and Donnel resided in Sunbury, no one was better qualified than David Rockefeller to tell who originally located these lands. In his testimony (page 60 of the record) he says:

"Q. You have been County Surveyor here, haven't you?

A. Yes, sir.

Q. Had control of the county papers for many years, hadn't you?

A. Sixteen or eighteen years.

Q. Do you know, from anything of that kind, who were the deputies of Gray? If so, tell us.

A. I think at that time he had five regular deputies. He had Harry Donnel, John Reese, Thomas Hamilton, William Brady. I don't recollect the other one.

Q. Henry Donnel was the father of Judge Donnel?

A. Yes, sir.

Q. When did he die?

A. I think he died in the month of June, 1825.

Q. Do you know what part of Gray's district Donnel had?

A. I think pretty much all on this side of the river; in the Shamokin coal region.

Q. You know from the official papers his district was on this side of the river, embracing Shamokin and Mt. Carmel coal regions, where these surveys are, do you not?

A. Yes, sir; Gray had three very good deputies, Donnel Reese and Hamilton, but Brady and the others run helter-skelter; very wild."

That Mr. Rocketeller was correct in stating that Donnel was the deputy who did this work, is well known to every surveyor of any experience in the county, and the defendant offered to prove this which the Court rejected. If he actually located these warrants in 1793 and 1794 for Gray, his declarations made a few years after, when the marked trees were still there, while running the lines of the same tracts would be far more valuable than the testimony or theories

of surveyors who ran the lines more that half a century afterwards, when nearly all the old land marks had disappeared.

John Fisher was a reliable, intelligent old gentleman, who had resided within sight of these lands all his life and had been a part owner of the Brush Valley block.

He knew Henry Donnel very well as a surveyor. He stayed at his father's house when he surveyed lands in the neighborhood of these tracts. Fisher says he did a good deal of surveying in that neighborhood. In 1814 or 1815 Henry Donnel surveyed several of the tracts in dispute, including the line in question, and John Fisher was one of the chain carriers for him. They started at the northwest corner of the Daniel Reese tract, in sight of his father's house, thence along the top of the mountain to the northwest corner of the Billington tract, and then ran the cross line between the Billington and the Reynolds to a stone corner among maple sprouts, near the swamp, about sixty rods south of the alleged maple sprout corner of David Rockefeller.

When Donnel reached this point he said, "here is the corner," pointing to it. From this corner Donnel ran east to the southwest corner of the Daniel Reese. Afterwards he ran the western line of the Daniel Reese and then started on the northern line of the Billington and ran eastward along the top of the mountain to the Thomas or Mary Ruston, Jr., and then south across the valley to a cove in Big Mountain, on the southern line of the Brush Valley block. From here Donnel ran westward to the corner of the Billington, near the swamp. (See Fisher's testimony, 152 and 153, of the record.)

Fisher knew the lines of these tracts well; had seen this corner, he said, over one hundred times. It was near a swamp where he went hunting and passed it many times every year for forty years.

He knew it to be on the recognized line between these two blocks of surveys.

The Court rejected the testimony of Fisher as to the declarations of Henry Donnel, made at this corner, while in the act of surveying these lands. The declarations made by Donnel were as follows: "Mr. Donnel said at the time, while there at that corner, that twenty-one or twenty-two years ago we located these warrants. When we got to this corner Mr. Donnel said, 'here is the corner,' pointing to it. At the time Henry Donnel said he located these warrants twenty-one or twenty-two years ago, he was surveying the Brush Valley lands. By the Brush Valley lands I mean the Ira T. Clement lands."

In rejecting these declarations it is submitted the Court clearly erred. When the location of a tract of land or a block of surveys is in dispute the declarations of a deceased surveyor made while running the lines are always admissible. Upon this question there is an abundance of authorities.

In the case of Kennedy and Rubold, 88 Pa. St., 7 Norris, page 246.

The declarations of a deceased surveyor were held to be admissible and strong evidence of the location of the lines which he was running. A settlement had been made on an undrawn donation tract, No. 1260, in 1819. The tract had been located in 1785. In 1835 Charles Ferris, who had acquired the interest of the settlers, employed James Herrington, then deputy surveyor, to examine the lines and survey the tract. He made the examination in no official capacity, nor had he been in any way connected with the original survey. While making the survey he blocked two corners and declared them to be original corners. On the trial of the case, thirty-nine years after he made the survey, these declarations were proven.

The Court below, in charging the jury, said of this evidence:

("There is evidence of what Herrington or some surveyor said when he went to this tract or corner. That is heresay

evidence and we admitted that with a good deal of reluctance. We hardly believe it is evidence. We say to you in determining that evidence, it is weak evidence. It is not as strong evidence as that of witnesses who come here upon the witness stand and submit to cross-examination in testifying to what is the true corner from the very necessity of the case. We submit it to you to take into consideration. In 1838 Herring and Ferris, going there with just a mere contention of his own, without any one to gainsay him, what he said thirty-nine years ago is testified to now by witnesses who say they heard him so state. We say his opinion is weaker than the testimony of Long, Mumford and Beatty, who came upon the stand and gave testimony of what they saw in later years.")

Chief Justice Agnew, in delivering the opinion of the Court says, page 255:

"They seem to have been tried upon the doctrine of leaving first principles and going on to perfection. But old surveys are not to be so tested. Most perfect in the beginning, they are constantly undergoing change, and, until by wind, fire, rottenness and the acts and frauds of men, their evidence lie only in memory and hearsay. Hence when the learned Judge said of the acts of the surveyors who forty years before went upon the ground, ran the lines, blocked the trees, counted the growths, found original marks and pronounced the hickory the numbered corner of donation lot No. 1260, it was mere hearsay, he hardly believed it evidence, admitted it with reluctance, and it was weak evidence of determining. he clearly misled the jury. The reverse is true. The evidence was strong and ought to prevail unless clearly rebutted, by showing either a mistake of the witness relating the facts, or error in the surveyors making the declaration that the hickory was the numbered corner and the white oak opposite an original corner. Herrington in 1837 and Fenton in 1838 were engaged in professional acts, the

latter locating the warrant officially and under his oath of office. The declarations as to the corners when found, blocked and counted, were a part of *res gesta*, and so far from being doubtful evidence were competent and always admitted when the transaction is old and the surveyor dead."

The case of Kramer vs. Goodlander, 98 Pa. St., 2 Outerbridge, 366, is in direct opposition to the ruling of the Court below. Justice Trunkey, in delivering the opinion of the Court, says, (page 369):

"Having proved by the witness who owned the Smith tract about thirty years ago that he then employed David Ferguson, a surveyor, to trace the lines, and that said Ferguson is dead, the following offer was made: 'The defendants propose to prove by the witness on the stand, Jacob Kuntz, what David Ferguson, a surveyor, who made the survey on the ground, since dead, said when on the ground at the time of making the survey for Kuntz, the owner of the J. B. Smith warrant, as to what the beech testified to by Kuntz was, also as to what he said the line on which he found it was; that is, the north and south line, the parties being then on the ground searching for the west line of David Kennedy, No. 1434, as the eastern boundary of Jonathan B. Smith.' This was objected to as purely hearsay, the surveyor not having examined the line or corner to ascertain its age, never having been on the ground before. Had he ascertained its age what he said respecting the line would have been admissible, yet purely hearsay. From an early day in this State, in litigation respecting boundaries it has been competent to prove, after the death of a surveyor who had examined a line, what he said respecting it at the time and on the ground. The more careful and thorough his examination the greater weight his testimony would have if living, or what he said at the time, if dead. But if he examined the line he is a competent witness, and after his death his

statements respecting the line, made at the time of the examination, may be proved."

Bender vs. Pitzer, 27 Pa. St., 3 Casey, 335 :

Knox, Justice, says: "It has long since been settled, both in this country and in England, that ancient boundaries are provable by general reputation in a question involving public rights. In Pennsylvania still greater latitude has been allowed in questions of boundary. Here the declarations of a deceased person touching the locality of a boundary between adjoining owners have been admitted where the survey was made by the person making the declaration, or where the declaration was made by an adjoining owner, who pointed out the boundary line between the tracts to the witness at the time the declarations were made: Caufman vs Congregation of Cedar Spring, 6 Binn, 59; Hamilton vs. Menor, 2 S. & R., 70."

McCausland vs. Flemming, 63 Pa. St., 13 Smith, 38:

Agnew, Justice, says: "Pedigree and boundary are the excepted cases wherein reputation and hearsay of *deceased* persons are received as evidence. The statements of deceased persons relative to boundaries of which they spoke from actual personal knowledge, have been frequently received as evidence in this State. And ancient maps and surveys are evidence to elucidate and ascertain boundary and fix monuments: Penny Pot Landing, &c., vs. City of Philadelphia, 4 Harris, 91 ; Sample vs. Robb, Id., 319."

Caufman vs. The Presbyterian Congregation of Cedar Spring, 6 Binney, 59:

Chief Justice Tilghman says, page 62: "But on the trial of the cause the defendant objected to the admission of some of those facts in evidence. The validity of those objections is now to be examined. In the first place it was contended that parol evidence of what was *said* by *Wilson*, the assist-

ant of Maclay, ought not to have been admitted, because the official return of survey was the best evidence of the survey. But the evidence of Wilson's words was not let in with a view of contradicting the return of survey; it was only to show what were the boundaries of the plaintiff's claim. It will be recollected that Wilson is dead, otherwise nothing less than his own oath could have been received. Where boundary is the subject what has been *said* by a deceased person is received as evidence. It forms an exception to the general rule."

1 Wharton's Law of evidence, Sect. 191:

"In connection with evidence of reputation, which has been just treated, may be considered that of the declarations of deceased persons familiar with a location and having no tendency to mislead. Such declarations have been received when the declarant is deceased and was at the time of the declaration competent and disinterested, provided, however, they were made while he was pointing out the boundaries to which they relate."

Borough of Birmingham vs. Anderson, 40 Pa. St., 4 Wright, 506:

Read, Justice, says, page 514: "But the declarations of a deceased surveyor in relation to lines run and plans made from actual survey are clearly evidence in an instance like the present, which concerns a matter of general if not public interest. It is of no consequence whether such declarations were under oath or not, on a bill to perpetuate testimony, or on the trial of a cause between other parties. It is within a well known and well defined exception to hearsay testimony."

There can be no mistake as to the correctness of the testimony of Mr. Fisher as to the fact that Donnel did run the lines in 1814 or 1815, as detailed by Fisher, as there is abundant evidence on the ground to show that Donnel was

there and marked trees in the course of the lines run by him. Trees were found along the disputed and other lines run by Donnel the axe marks upon which counted back to 1814 or 1815. (Pages 71, 72, 79 & 110 of the record.)

When Clement's surveyors ran the disputed line Fisher pointed out the corner near the swamp which Donnel had declared to be the corner and the line in 1814 or 1815. (Page 110.)

The line run by Donnel is in the course of the north line of the plaintiff's block of surveys and a line run westward from the undisputed "post by a pine" corner by the original marked trees on the north line of the Branham; would strike the line trees marked by Donnel in 1815. To the ordinary mind the fact that Donnel, in 1814 or 1815 ran this line, marked trees upon it and declared it to be the line dividing these blocks of surveys, would seem to be powerful and convincing evidence that this was the true line, and, as Chief Justice Agnew, in Kennedy and Lubold, *supra*, "ought to prevail unless clearly rebutted by showing either a mistake of the witness relating the facts or error in the surveyors making the declaration."

Seventh Specification of Error.

Some of the defendant's surveyors testified, that the trees around the Richard Martin tract had been marked by the same surveyor at the same time he ran the north line of the Brush Valley block in 1793; that the surveyor started at the Francis West, the location of which must have been well known to him, as he had been there only a few days before, and ran westward, making offsets in the line to keep on the top of the mountain, until he came to the northwest corner of the Daniel Reese; that he then filled in the eleven war-

rant from the west, running the cross line between the Billington and the Reynolds, and part of the southern line of the block, and that there was left, after exhausting his warrants, surveyed land for the Richard Martin, for which a warrant was obtained a short time after.

That at the same time he ran the southern line of the Martin and the Brush Valley block. Their reasons for this opinion were that the marks were made about the same height by the same axman, who marked them very high. They bore the same date and the northern line of the Lobdil was dotted on eastward from the northeast corner of the Lobdil, over the Martin. Such dotted line, the defendant's surveyors testified, indicated that the surveyed line extended eastward beyond the corner. Some of the plaintiff's surveyors also testified, that such dotted line on the return of a survey indicated an extended line. As to the opinion of these expert surveyors, all men of experience in the examination of line trees, the learned Judge says: "It is true, the defendant's surveyors express the opinion that the Martin was surveyed at the same time with the Lobdil, and the other warrants of the Brush Valley block, but in the face of the official returns this opinion is *entirely worthless.*

"In the nature of the case, it is a matter of *pure speculation* on the part of these surveyors.

"The opinions of surveyors are constantly received on such questions and are not considered *worthless* by the Supreme Court."

Northumberland Coal Co. vs. Clement, 95 Pa. St., 14 Norris, 108:

"The testimony of practical surveyors of large experience in tracing original lines, and especially the testimony of those acquainted with the marks made by the surveyor who located the warrants was properly admitted. It is true the surveyor must not be permitted to testify as to the legal interpretation

to be given to a survey, yet a practical surveyor may testify whether in his opinion certain marks on trees, piles of stones or other marks on the ground were intended as boundaries. Wharton's Evidence, Sec. 444; Davis vs. Mason, 4 Peck, 156; Lessee of Forbs vs. Caruthers, 3 Yeats, 527; Ormsby vs. Ihmsen, 10 Casey, 462.

In the case of Davis vs. Mason, 4 Pickering, 156. Holman, an exper enced and *skillful surveyor*, was asked whether in his opinion, from the appearance of certain heaps of stones and trees they were or were not *boundaries*, to which objection was made, and which was assigned as error. In delivering the opinion of the Supreme Court, Parker, C. J., said: "The testimony of Holman was rightly admitted. He being a practical surveyor with long experience, would have acquired a skill in determining whether marks on trees or piles of stones were intended as monuments of boundaries, which makes his opinion proper evidence." (*Note*—See Peterborough vs. Jaffery, 6 N. Hamp. R., 464, and cases here cited.)

Lessee of John Forbes vs. Anthony Caruthers, 3 Yeates, 527. "Mere abstract opinion is not evidence; but a *surveyor*, or any other person conversant in the subject, may state facts and his opinions on those facts, to enable the jury to form a correct judgment of the matter in dispute. It is general information in a question of science, which others unacquainted with the subject must necessarily want."

Ardesco Oil Company vs. Gilson, 13 P. F. Smith, 146:

Sharswood J., in delivering the opinion, (p. 151) says: "An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked." *Ib.* 656; Price vs. Powell, 3 Comstock, 322; Fowler vs. Middleton, 6 Allen, 92. * * * "While undoubtedly, it must appear that the witness has enjoyed some means of special knowl-

edge or experience, no rule can be laid down, in the nature of things, as to the extent of it. It must be for the jury to judge of the weight to which his opinion is entitled."

In the case of Detweiler vs. Grofi, 10 Barr, 378, Burnside J., says: "In questions of science, skill and trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give opinions in evidence. 1 Greenl. Ev., §440. Their opinions are confined to their judgment on the facts proved. Jameson vs. Dunkild. 12 Moor., 148; 22 Eng. C. Law, 442; 23 *Ib*, 296" Penna. R. R. Co. vs. Henderson, 1 P. F. Smith, 315, Read J., page 321, says: In Kellogg vs. Krauser, 14 S. & R., 137, nearly forty years ago C. J. Tilgham said (p. 142): "The principal reason assigned by the plaintiff against this evidence was that *an opinion* of the value of land is not evidence, because it is not a fact. It is certain that such opinions are every day received as evidence, although it is true that an opinion is not strictly a fact. * * * It is a kind of evidence so often admitted, without dispute or objection, that I have no doubt of its legality."

In Brown vs. Corey and Peterson, 7 Wright, 495, Woodward J., in delivering the opinion says, speaking of the opinions as to the value of land: "The value of real estate which has not been offered in market is often a very difficult question. It belongs to that class of facts which exclude direct evidence to prove them, being such as are either necessarily or usually impreceptable by the sense and therefore incapable of ordinary means of proof. Pedigree, character, prescription, custom, *boundary* and all those questions of skill and art to which experts are commonly called, are of this class. * * * The grounds of the opinion, like the opinion itself, should generally be referred to the jury to judge of. * * * The jury's estimate of the opinions of witnesses would necessarily be much affected by the grounds they rested on, and it was error to deprive the party of the full benefit of the testimony."

The Fourth, Fifth, Thirteenth, Fifteenth and Sixteenth Specifications of Error.

In the portions of the charge complained of in these assignments of error, the learned Judge seems to have forgotten that Elisha A. Packer was plaintiff, and therefore obliged to recover upon the strength of his own title and to show that the William Elliott, survey embraced the land in dispute, and seems also to have overlooked the fact that the Elliott is one of a block of surveys and that monuments on the Branham, also a member of the block were monuments for the Elliott, and that monuments control calls.

In that part of the charge complained of in the fourth specification of error (page 189 of record) the learned Judge entirely ignored all monuments made for the plaintiff's block, and told the jury, "Wherever the true southern line of the 'Brush Valley' tracts called for by the William Elliott may be, to that line it must go."

In that part of the charge embraced in the fifth specification of error, (page 190 of the record,) the learned Judge after stating that the plaintiff claimed that the southern line of the Brush Valley should be fixed at the end of the official courses and distances from the northern line of the block, stated the claim of the defendant's in such language as to unduly prejudice the minds of the jury, by leaving them to infer that the defendant's quantity of land would be greatly increased, and that it involved "a wide portion from the official returns of survey."

The contrary is true, the location claimed by the defendant preserves the exact configuration of the block, while that claimed by the plaintiff would distort the surveys. It would either make a square offset of thirty-two perches between the Martin and the Lobdil, where the Gray returned a straight line, or the course between the Martin and Branham would have to be changed to three courses and their common monuments disregarded, it would increase the width of the tract about

sixty perches and its quantity about eighty per cent. The narrow neck of the Walker would be about five times the width Gray returned it was. He should have also told the jury that the plaintiff's location would have made the western line of the Elliott about one hundred and twenty-eight perches instead of sixty-seven, the eastern line of the Elliott one hundred and seventy-one perches instead of one hundred and twelve, and the line between the Branham and Brown over one hundred and fifty perches instead of one hundred and twenty-four, and that the Elliott would be almost doubled in quantity.

The learned Judge then says: "If the true southern line of the Brush Valley block is where the defendant claims it to be, the land in dispute would be within the lines of the Ruston and Myers, but if where the plaintiff claims it to be, the land would be outside of that block and "within the lines of the William Elliott." This was stating to the jury, that if the southern line of the Brush Valley block was fixed at the end of the official distance, "to that line the Elliott must go," notwithstanding there were undisputed monuments on the northern lines of other tracts of the same block with the Elliott, in opposition to well established principles of location where surveys were made and returned into the Land Office in blocks.

In answer to the plaintiff's 11th point, in the thirteenth specification of error, (page 201 of record,) the learned Court really took the whole case from the jury. The point requested the Court to say to the jury, "that in the absence of marks on the north, made for the William Elliott, in 1794, by the Deputy Surveyor, the William Elliott must go to its calls for adjoiners on the north; that as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds, and therefore the William Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston according to the official courses and distances for their

northern line or the Rockefeller maple corner." This the Court affirmed without any qualification whatever, thus charging the jury, that as the Elliott called for the Ruston and Myers, it must go to the southern line of these tracts at the end of the official distance from the northern line of the Elliott, *but that there is no such evidence.* This, it is submitted, was a binding instruction to the jury to find for the plaintiff.

A half dozen of surveyors had testified to original marked trees on the northern line of the Lewis Walker. yet the Court by this answer say, that these monuments have no effect on the location of the northern line of the Elliott, but that it might be arbitrarily torn away from the block and its northern line fixed sixty rods further north than William Gray returned on oath into the Land Office; that he had placed it sixty rods further north than its eastern adjoiner, the Lewis Walker. The jury must naturally have understood the Court to say, that the verdict must be for the plaintiff, or that the testimony of all the defendant's surveyors as to original marks on the north line of the Walker and Branham, was not to be believed, which of course would be error. That one tract of a block can be located arbitrarily without reference to the marks on other tracts of the same blocks is in direct conflict with the settled law of Pennsylvania. There are any number of decisions of the Supreme Court of Pennsylvania directly to the contrary, some of which will be cited. Again, in answering the defendant's seventh point in the fifteenth specification of error, (page 203 of the record,) in which the Court were requested to charge the jury, that if the jury believed that the William Elliott was one of a block of surveys with Lewis Walker, Nathaniel Brown and Ebenezer Branham, calling for a common northern line, marks or monuments on the northern line of any one of these surveys, would be marks for the Elliott, which the Court refused, charging the jury, that the Elliott called for the Myers and Ruston, and "no marks on the ground have been found to limit that call," and "as we have instructed the jury in our general charge, wherever the

true line of the Brush Valley tracts called for by the William Elliott may be, to that line the William Elliott must go."

Here again the Court gave binding instructions to the jury that the verdict must be for the plaintiff, saying there was no evidence to justify any other verdict but that the Elliott must go to the Ruston and Myers south line fixed at the end of the official distance. What was there for the jury to find after such instructions? The Court say if there are no marks on the north line of the Elliott to limit its call, *and there are none*, then the Elliott must go to a fixed point. The Court might just as well have said on the whole evidence your verdict *must* be for the plaintiff.

Again, in answering the defendant's eighth point in the sixteenth assignment of error, (page 204 of record) the same error was committed. The Court were requested to charge the jury that if they found that the "post by pine corner" called for or adopted by the Ebenezer Branham, was well established and that trees had been found on the northern line of the Ebenezer Branham in the official course of the line, corresponding to the date of survey, such trees and that course would be monuments fixing the whole northern line of the La Fevre block and the northern line of the Elliott survey, which request was refused.

That the Court fell into manifest error in all the foregoing rulings there can be no doubt. There is no better settled principle of land law in Pennsylvania than that where several tracts of land were originally made and returned into the Land Office in a block they must be located on the ground in a block. This doctrine has been declared by the Supreme Court of Pennsylvania with reference to this very line. The question of the location of this line has been twice before the Supreme Court, in cases where Ira T. Clement was plaintiff instead of defendant, as in this case.

Northumberland Coal Co. vs. Clement, 95 Pa. St., 14 Norris, 126:

It was held: "Where surveys have been made and re-

turned as a block the location of each tract therein may be proved by proving the location of the block. The inquiry is not when a tract should or might have been located, but where it actually was located. Every mark on the ground tending to show the location of any tract in the block, is some evidence of the location of the whole block, and therefore of every tract therein."

This was said in a case involving this identical question, the same line between members of the same blocks of surveys, and it is submitted is in direct conflict with the charge of the Court below in this case.

Hagerty vs. Mathers et al., 7 Casey, 355:

"Where a younger block of surveys calls for two older blocks, the location of one or two particular tracts of the younger block is not to be arbitrarily determined, but is to be got at by first locating the block of which they are a part. In other words, where surveys were made and returned into the Land Office in blocks, they are to be located on the ground in blocks."

Darrah vs. Bryant, 6 Smith, 69:

"When warrants are surveyed as a block they must be located as a block."

Walters and Boynton vs. Hagarty, 1 Wright, 64; Boynton vs. Urian, 5 Smith, 151:

In Fritz vs. Brandon, 28 Smith 351, it was held that when several tracts are surveyed and returned into the Land Office as one block, they are to be considered as one tract, and that marks on any tract of the block belong to each tract of the block.

Agnew, C. J., in delivering the opinion of this Court, says:

"When one person is owner of all the warrants, they may be surveyed together in a single block by exterior lines, leaving the interior lines to be settled by the owner himself. Mock

vs. Ashtly, 13 S. & R., 382; Stevens vs. Hughes, 3 W. & S.,465; Collins vs. Barclay, 7 Barr, 73; Hagerty vs. Mathers, 7 Casey, 348. The legal effect is that the entire block is viewed as one tract. Hence, C. J. Lewis said, in Hole vs. Rittenhouse, 1 Casey, 491: 'Under these circumstances it is evident that the whole fifteen surveys adjoining each other in a single block, without interior lines, all made at one time and owned by the same party were essentially but one tract, which the owner might occupy or subdivide at his pleasure.' This principle was in the mind of C. J. Woodward when he said, in Malone vs. Sallada, 12 Wright, 425, 'And when we are dealing with blocks of surveys we must remember that the marks on any part of the block belong to each tract in the block.' So Judge Strong said in Darrah vs. Bryant, 6 P. F. Smith, 75, 'And if they were surveyed as a block, they must be located as a block.'"

The case of Malone vs. Sallada, 48 Pa. St., 12 Wright, 419, is a leading case and is in direct opposition to the charge of the Court. Under this authority the Court should unqualifiedly have affirmed the defendant's seventh and eighth points.

Woodward, Chief Justice, in delivering the opinion of the Court, (page 424,) says: "Located by these adjoiners, Isaac Miller would take the land in dispute, but several of its courses and distances and the configuration of the survey as returned into the Land Office, would essentially be changed, notwitstanding these consequences, however, the defendants insisted upon its location by its calls.

"The plaintiff's, on the other hand, contended that the whole block of twenty-five surveys should be located by the marks on the ground, with no other reference to calls for adjoiners than such as would be consistent with the marks on the ground; and that it is immaterial that no marks are found on the Miller survey, since authentic marks are found on other tracts of the block sufficient to locate the whole block, and that these marks apply with decisive effect to Isaac Miller.

"They deny also that Merrick Starr was called for on the west of Isaac Miller, but if it was, they say it was a mistake and must be rejected in favor of the courses and distances as returned.

"In a word, the plaintiffs would locate the Isaac Miller by the marks on the ground of other tracts, in connection with which it was surveyed and returned.

(Page 425) "And when we are dealing with *blocks of surveys*, we must remember that the marks on any part of the block belong to each tract of the block. Interior lines were never run and marks are not to be looked for on them; but if marks are found upon the ground to establish an exterior line of a particular tract of the block, and we find *other tracts returned with that same line*, we are to presume it was adopted as the boundary of these tracts, no less than of the tracts which bear the marks. When the surveyor, for instance, ran from the pine corner of Gilbert and Brooks to the stone corner of Lomison and Paul, his course for more than three hundred perches was south ten degrees east, and these two courses carried him the whole width of the Gilbert and Miller tracts, and formed the western boundary of these respective tracts, no marks are found on these lines, but the pine and stones are sufficient to locate them."

Again, on page 426: "It must lie where it was placed, and seeing that it was part of a block it must lie where the block placed it, and of the location of the block the marks on the ground are the best evidence in behalf of which calls for adjoiners even if unequivocal must be rejected."

Pruner vs. Brisben, 98 Pa. St. 2 Outerbridge, page 202:

Justice Sterrett in delivering the opinion of the Court, (page 210) says: "They were instructed, *inter alia*, that the thirteen tracts having been surveyed in a block, and so returned, must be located upon the ground as a block; that neither of them can be arbitrarily located in disregard of the

lines and corners found upon other parts of the block. All the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to each and every tract of which it is composed, and if sufficient lines and corners can be found they determine the location of the entire block *without regard to its calls for adjoiners*, or for waters, if such calls conflict with the lines actually run upon the ground and returned. The calls in a survey for water, such as springs, ponds and streams, must be considered by the jury in determining its location, but the value of such evidence must depend upon circumstances. If the surveyor, instead of going upon the ground and there running and marking the lines, merely plotted the survey in his office, little accurate knowledge of the location of waters and his call he could have for them would be but slight evidence of their existence. It requires neither argument nor citation of authorities to show that the learned Judge was clearly right in thus instructing the jury."

Christ vs. Thompson, 2 Central Reporter, page 523:

The Court below charged the jury as follows: "Now, where surveys have been made in a block and one of its members can be identified or located upon the ground, then there is no difficulty whatever in locating the whole body or block by official courses and distances where there are no lines or monuments of any kind, or adjoiners of any kind, found upon the ground. If the George Campbell tract is surveyed according to its official courses and distances in the tier to which it belongs, the jog would exist as contended for."

The Supreme Court in affirming this charge say:

"The question here was one of location, as is often the case. The correct location of a particular tract is ascertained by determining the location of other tracts in the same block of surveys. The location actually made on the ground is a question of fact to be found from all the evidence.

EIGHTH, NINTH, TENTH, ELEVENTH, TWELFTH, FOURTEENTH AND SEVENTEENTH SPECIFICATIONS OF ERROR..

The whole tenor of the charge of the Court shows that it was calculated to mislead the jury and withdraw their minds from the real question at issue and taken as a whole must have impressed the jury that nothing was left but to render a verdict for the plaintiff. The learned judge seemed to have forgotten that we were dealing with surveys which had been located almost one hundred years before the trial. Scarcely one person in the State of Pennsylvania was living at the time of the trial who was five years old when these surveys were made originally, more than ninety years had elapsed since the line in question had been established and no one connected with the survey was living.

Time, which had removed all the parties connected with the survey, had also removed the monuments made by them. However well marked these lines may have been in 1793 and 1794, or even in 1814, when Henry Donnel retraced them at the time of the trial few original marks would have been expected to have been found by any surveyor. As said very truly by Chief Justice Agnew, in Kennedy vs. Lubold, 7 Norris, 255, "most perfect in the beginning they are constantly undergoing change and decay, until by wind, fire, rottenness and the acts and frauds of men their evidence lie only in memory and hearsay."

These lands are located upon mountains which until within a few years were thought to be worthless or of little value. Line trees had been exposed to forest fires which passed through the timber almost annually, until very few remained that could bear the marks of the axeman of 1793 or 1794, and therefore, as was said by the Supreme Court, in Glass vs.

Gilbert, 8 Smith, 291: "Slight evidence of marks found upon the ground corresponding with the date of survey ought to have *great weight* in repelling the charge of its being a mere chamber survey." The experience of parties to this suit demonstrates this fact. Six surveyors connected with this case have died since the commencement of litigation concerning this disputed line. Very few of the trees found by those who first examined the lines can now be found. These facts demonstrate the necessity of resorting to the work of the same surveyor on adjoining tracts to ascertain where the surveyor actually located the lines in 1793. The remarks of Judge Duncan, in the case of Lambourn vs. Hartswick, 13 S. & R., 121 & 122, in relation to such surveys, in his opinion, delivered sixty years since, seems particularly appropriate:

"It is as difficult for the owner to keep alive his marks on the ground as it is impossible for him to keep alive the witnesses who made them. Time, the exterminator of all things, accident by tempest and by fire may prostrate the best marked lines; and when to this is added the destructive hand of man, who is lead into the strong temptation of rooting up the distant owner's land marks, and *thereby, by this accursed* thing of removing land marks, making himself the owner of the land; the reasons are very cogent in favor of this legal presumption. It is not required of the Court now to decide this, and such a case has not heretofore come directly in judgment. At present, according to the spirit of all former decisions, it appears to me sufficient evidence of a survey returned, an actual survey, to show that any part of it was made on the ground.

The remarks of Judge Huston, who was one of the ablest land lawyers of Pennsylvania and Judge of the Supreme Court, in his Land Law of Pennsylvania, page 465 and 466, are also applicable to thes surveys:

"The object in surveying and marking the lines, was to ascertain the quantity to be paid for, and to designate each

particular tract and distinguish it from all others. And it seems to have been taken for granted, thoughtlessly, that trees would stand forever.

"They die as well as men; they are cut down, and blown down and killed by fire running through the woods; so that at this day there are many tracts of ten miles square in the older counties *in which there is not to be found* a single tree marked at the time when the first survey was made. Where marks are to be found they were made on resurvey of the tract. I have been present at many trials in which it appeared that there was no tree on the tract of land, except fruit or ornamental trees planted long since the date of the warrant. This death and destruction of timber is now pretty well understood, so that no lawyer of any experience or reflection expects to find on the ground all the corner trees marked even thirty years ago; and it sometimes happens that not a single corner, or but a chance one, is to be found in surveys made forty or fifty years ago. * * * *

"Hence it would seem that a survey was considered an essential part of a title in Pennsylvania. And so it was. But it was not essential that the marked trees which designated the tract should be kept alive forever, nor was it essential that there should be living trees. If there was no tree where the Deputy Surveyor intended to make a corner, a post was driven into the ground, and this would rot in a few years. If there was no timber to set in as a post, two or three stones were laid, one upon another, and these stones were called a corner; and they might be removed very innocently by those who wanted to use them, or very dishonestly by those who meant to destroy the title. Thomas Smith, when a Judge of the Supreme Court, about the year one thousand eight hundred, laid down the law in one case, that if a surveyor had begun to make a survey and stopped before he completed it, and completed it by protracting two or more lines, the owner could only hold by what would be comprised within the lines actually run, and a straight line from where he left off sur-

veying to where he begun. We had no reports at that time of cases tried in the country, but decisions respecting titles to land were reported by parole and soon spread far through the country. Judge Smith, upon reflection, soon changed his mind, but the report of his decision occasioned many disputes. If a part of the lines of a survey could not now be found on the ground, there were men who attempted to take away part of the tract; and what was worse, there were men who sought for corner trees and cut them down to destroy the title. This led courts to serious reflection on the subject, and many decisions are to be found respecting surveys; and these decisions are not always consistent with each other.

"The later decisions corrected many cases decided without much reflection."

Also the opinion of Justice Huston in Martz vs. Hartley, 4 Watts, 263 & 264:

"I cannot concur with the opinion of the Court as applied to the facts of this case, or as being true as the general law of this State. There is no survey of ordinary size, the lines of which will measure exactly to the corners, or to the place where they once stood; hence every surveyor, in tracing old surveys, expects to find, and does find, the length of every line differing more or less from his draft. In many parts of this State there is not one original marked tree in each ten miles square. Is each tract to be remeasured carefully and all overplus to become vacant land? The doctrine of confining a man to the precise distance in his draft will not do; it will not do justice; it will not, in any case, give a man the land in his draft; and it would unsettle the extent of every old settled tract of land in the State. After the lapse of many years line trees are not found, snd nobody, who knows anything about it, expects to find them. Trees die as well as men—are liable to wind and fire—and, like men, are sometimes maliciously destroyed. * * * * *

"It had been supposed that titles to land had been nearly

settled, and on principles satisfactory to all reasonable men; but the doctrine that where lines are still standing, a man must be confined to his strict measure, would set all afloat; and the oldest would be the worst title, and continue to grow worse as a tree died, was blown down by the wind or dug up in the night. * * * * *

"A little reflection will satisfy the acute mind of the judge who decided this cause, that rules applicable to finding lines of surveys which were perfectly correct a few years after the survey was made, are totally misplaced after the lapse of a half of century.

"The time is coming, and in some parts of the State has come, where no original lines are to be found. How are we to ascertain our boundaries in such case? Why, just as they are ascertained in incalculably the greatest part of the world. What a man has possessed long enough to be protected by the statute of limitations he has a right to; the place in which he and his neighbor have said for twenty-one years his line is, must continue to be the place where it is. There is no other doctrine on which titles can be safe; and nothing more destructive of title could be invented than *substituting theory about variation of the compass instead of lines once seen and since acknowledged*, till the trees and those who marked them are no more. Akin to this, and no better, is the investigation whether a long line is perfectly straight, and pairing and trimming a survey made in the wilderness in cold or wet, or under circumstances which occasioned hurry, by one through cleared land, made at leisure.

"When the survey was made the title was agreeable to it, whether it was or was not accurate in all respects; and the owner had a right to his marked lines, and by his lines, though not straight, and though it was a little *longer or shorter* than designated on the draft."

See also Sergeant's Land Law of Pennsylvania, page 128.

"But should it prove, after a lapse of time, that these

marks cannot now be found, it does not necessarily follow that they were not made. Trees may have rotted, or been burnt, or cut down, posts and stones removed. If any part appears on the ground, or if there are sufficient lines to show that the surveyor has been there, and the survey has been duly returned, it will be a question of fact for the jury whether the surveyor did not do his duty by marking the lines on the ground, though not now to be found."

If these opinions and declarations of the ablest land lawyers and judges of Pennsylvania were correct years ago, how much more liberal should judges now be in relation to evidence tending to establish lines of 1793 and 1794.

It is a fact known to every judge and lawyer of any experience in the trial of land cases involving location of lines, that not one line in one thousand will measure the same as returned into the lane office, and that nearly every line will overrun with strict measurement especially in the mountain regions where the surveyor was always liberal and always gave an allowance to the purchaser.

In the case of Northumberland Coal Co. vs. Ira T. Clement, 95 Pa. St., 14 Norris, 126, this same question was involved with the exception that Ira T. Clement was plaintiff below, and therefore required to show that the land in dispute was within the lines of the Brush Valley block, and in this Elisha A. Packer is plaintiff, and therefore required to show that the lands in dispute are within the lines of the La Fevre block. There was this material difference also, at the trial of that case, only one line tree, the pitch pine line tree, sixty-five perches west of the post by a pine, had been discovered between the Branham and Martin, while on the trial of this five trees had been discovered and testified to as originals, bearing the dates of the surveys of one or the other of these tracts. The evidence therefore was much stronger on this trial.

Justice Mercur, in delivering the opinion of the Court, on page 137, says:

"This contention is as to the location of a tract surveyed in the name of Thomas Billington. It is one in a block of eleven tracts, for which warrants issued on the 11th of May, 1793. They were all owned by one person. The surveys made by virtue thereof were all returned to the office of the Surveyor General on the 3d of March, 1794. The block begins with the Daniel Reese on the west, and ends with the Samuel Lobdil on the east. The official returns show the surveys of the first four, and of the sixth in order, to have been made on the 2d of October, 1793. The return of the Thomas Billington, which tract is the fifth in the block, omits to state the precise date of its survey, further than that it was in 1793.

"It is, however, fair to presume it was made on the same day as the John Reynolds, on the west, and the Mary Ruston, on the east.

"The remaining five tracts were surveyed on the day next thereafter. The Richard Martin, which lies east of and adjoining the Samuel Lobdil, was surveyed on the 23d of February, 1794, on warrant dated the 22d of the month preceeding. The Lewis Walker, under which the plaintiff in error claims, lies south of and adjoining the Thomas Billington, and was surveyed on the 22d October, 1794, and return thereof made on the 23d February, following.

"Nearly ninety years have passed since the Billington warrant, was located. Time has effaced many marks of the survey. Those which were distinctly visible have, to a considerable extent, become obliterated or destroyed. The location of the northern lines of the Billington tract, and of the block of which it forms a part, is unquestioned. They are found distinctly marked on the ground.

"The main question is, where was the south line of the Billington tract located?

"The testimony of practical surveyors of large experience in tracing original lines, and especially the testimony of those acquainted with the marks made by the surveyor who located the warrants, was properly admitted. It is true a surveyor must not be permitted to testify as to the legal interpretation to be given to a survey, yet a practical surveyor may testify whether in his opinion certain marks on trees, piles of stones, or other marks on the ground were intended as monuments or boundaries: Whart. Ev., Sect. 444; Davis vs. Mason, 4 Pick. 156; Lessee of Forbes vs. Caruthers, 3 Yeates, 527; Ormsby vs. Ihmsen, 10 Casey, 462.

"The practical knowledge and experience of the surveyor, whose opinion was asked, are unquestioned. The facts proved were amply sufficient to enable him to form an opinion as to the actual location of the warrant. We will refer to some of them. The official survey of the Thomas Billington, calls for a small maple at its southwest corner. Maple sprouts are found at the place claimed by the defendant in error to be the southwest corner of the tract.

"The original surveys of all these tracts were made by Henry Donnel, acting as a deputy surveyor. It is shown that the same Donnel, in 1814, in running the northern line of the Lewis Walker tract, fixed the line between it and the Thomas Billington, to be where it is now claimed by the defendant in error. The official survey of the Richard Martin, calls for a white pine tree in its south line. That tree is standing and identified. That warrant was located by the same surveyor, and the return of survey was made three days before the survey of the Billington tract was returned. It calls for the Samuel Lobdil, on the west, and the line between the tracts is of the same length in each survey. He had the warrants in his hands at the same time. The location of the latter throws light on the former. The location claimed by the defendant in error for the Billington is not only in harmony with the block of surveys of which it forms a part, but also with the location of the Richard Martin, made by the

same surveyor soon thereafter. Without referring to the evidence more in detail, we think it was sufficient to submit to the jury to find the true location of the tract, and it was properly submitted by the learned judge."

Sweigart vs. Richards, 8 Barr, 436, is a leading case on this subject.

In this case a survey was made by Surveyor Galbraith in 1774, three lines of wh·ch were found. The fourth line was shown to have been marked by the same surveyor in 1795. The Supreme Court said that, in making the surveys in 1795, the surveyor conformed them to the southern line of the tract of 1774, in quest on, as might be presumed he ran it in 1774, and then remarked the line, which marks were on the ground, although those of 1774, on that line, could not be found.

Justice Coulter, in delivering the opinion of the Court, says (pages 440 & 441):

"The lines run and marked on the ground are the true surveys; and, although all the lines may not be found on the land, yet if the body of the lines are there, corresponding in data with the survey returned, the survey is valid, and authorizes a presumption that the other lines were actually run and marked, but have been effaced by time and tempest. But still more strongly are those lines good if they have been resurveyed and marked before an intervening right accrues, which was done in the case in hand. The testimony fully proves that the survey made by Galbraith, on the warrant under which the plaintiff claims, was made in 1774, and returned into the land office, and is well marked round a considerable portion of the tract.

But lines of that date are not found on the southern side, where the dispute about the boundry occurs. It appears, from the evidence, that a number of warrants were put into the hands of Galbraith in 1775, upon which he made surveys in that year, and above one hundred of these surveys

are regularly returned into the land office. Adopting the exact distance returned in the survey of 1774, the southern boundary of the tract in question would be near where the defendant below allege it to be, but where no marks are found on the ground except those made by direction of the defendants between twenty and thirty years since. It is this circumstance which gives the field notes and draft importance in the cause.

"The return of survey of 1774 and the patent carresponds, in course and distance of the southern boundary, with the survey made by Galbraith in 1775. And the returned survey and patent correspond with the Galbraith south line, as found marked on the ground, with this exception, that the distances in some of the lines leading down to this southern or black line, as it has been called, required to be lengthened beyond the perches mentioned in the patent.

"But this is a circumstance *so common in the early surveys* as to be of itself of small moment. The purchaser of land from the Commonwealth is bound to take notice of the lines on the ground, because they are the true survey.

There is not much force in the argument ingeniously urged by the counsel for the plaintiff in error that the field notes and draft of Galbraith were not returned to the Land Office so as to affect purchasers from the State with notice. But if two or more witnesses belonging to the ancient days of the Commonwealth had been found who were present at the survey of 1774 and testified that they saw Galbraith run the southern boundary of the tract and testified to its location, by marked trees or stones which time had obliterated, that evidence would not be of record, yet who could doubt its competency as evidence of boundary?

The Court correctly instructed the jury that the true evidence of the boundary of the land was the survey made on the ground; and as affording some evidence at least of where that boundary, as surveyed by Galbraith in 1774 was, the pa-

pers were properly received in evidence and commented on by the Court."

Three surveys call for a "post by a pine" corner, the Francis West, the Richard Martin and the Ebenezer Branham, as the Francis West survey, is the oldest by a few days, this corner was evidently made originally for that tract and adopted for the Martin and Branham surveys. By adoption, this corner became as effectual a monument for the Martin and Brenham survey, as if it had been marked for them also, and became a line tree for the whole northern line of the La Fevre block. Between the northeast corner of the Branham, the chestnut and the "post by a pine" the Branham calls for the same courses as the West, for one hundred and nine perches. Going westward from this corner in the dividing line between the Branham and the Martin, five original trees are found counting to the date of one or the other of these surveys. Surely these monuments are sufficient to establish the northern line of the Brenham and southern line of the Martin. By extending this line westward along the Brown, Walker and Elliott, the land in dispute would not be within the Elliott survey, and would strike the Reynolds and Billington maple corner, near the swamp where Donnel said in 1814 he had placed it when he located these warrants twenty-one or twenty-two years before, and would strike the trees marked by Donnel in 1814, while surveying the same line. The post by a pine was undisputed, and so are the trees found on the north of the Branham and south of the Martin. These surely fixed the dividing line between these surveys, and as the Branham calls for a straight line between it and the Martin, there could be no change in the official course until the western line of the Martin intersected this line, which would be the southwest corner of the Martin. Here we are met by the official recorded declaration of William Gray that the western line of the Martin and eastern line of the Lobdil, are the same length. He returned the Martin into the Land Office under oath, stating that the western line was three hundred and

twenty perches, and three days after returned the Lobdil, saying its eastern line was three hundred and twenty perches long.

What authority is there in this case at this point under the facts in this case to warrant a surveyor in making an offset in a line of a block of surveys of thirty-two perches, which had been returned a straight line? What authority would he have to double the Branham at this point and entirely distort the surveys and shape of the whole block?

The "post by a pine' corner is the point to which all these surveys are attached; it was an original monument for the Branham survey and for the Elliott, whether marked for this block or adopted—adoption is equivalent to remarking.

In Caul vs. Spring, 2 Watts, 394–395, Rogers, Justice, in delivering the opinion, says:

"The fact of the deputy surveyor going on the land is nothing, except so far as as it is difficult to conceive how he could mark the lines in ordinary cases without going on the land. In all cases except the present this would be required from the necessity of the thing. The argument of the counsel amounts to this, *that however well informed the deputy may be, even if he made other surveys the day before*, all of which were well marked, he must again go on the ground, or otherwise the surveys partake of the character of chamber surveys, and are void. I cannot believe that the law requires any such idle ceremony. In McRhea vs. Plummer, 1 Binn, 227, it is decided that if a survey has been made under legal authority, and the land surveyed remains open to purchasers, a warrant coming afterwards to the hands of the deputy may be applied by him to the survey already made without running and marking the lines anew."

"Again in Covert et al., vs. Irwin, 3 S. & R., 288, it is ruled 'that where a new survey is made, calling for the lines of an old survey, there is no occasion to mark the lines anew. There is not only no occasion for it, but it is obviously improper, as double marks are apt to make confusion.'

"A survey made under legal authority is presumed to be correctly made, and I cannot perceive what mischief can arise from permitting the deputy surveyor to *adopt* lines previously surveyed."

In Eister vs. Paul, 4 Smith, 196, it was held: "If lines are held upon any part of a block of surveys to which a disputed tract belongs, the disputed tract, from the time of its return, was an actual appropriation of the ground, and marks found upon any part of a block belong to each tract of the block."

In delivering the opinion of the Court in this case, Woodward, C. J., says:

"It is said the Strembeck was a chamber survey. We see no evidence of it. If lines are now upon any part of the block to which it belongs, (and this was unquestioned,) then the Strembeck was from the time of its return into the Land Office, an actual appropriation of the ground; for marks upon any part of the block belong to *each tract of the block.* Malone vs. Sallida, 12 Wright, 425. It would have been improper to set new marks on those sides of the Strembeck on which older surveys were called for, because the lines of those surveys became the lines of this tract, and new marks would only have tended to confuse boundaries."

In Dreer vs. Carskadden 12 Wright, 38:

"It was held that a deputy surveyor in locating a junior warrant should adopt the marks of an older survey instead of confusing evidence by marking new ones and that when such marks were adopted the line of the junior survey was as effectually located as if actually marked on the ground. The facts were very nearly like this case. Woodward, C. J., in his opinion says: "But the old maple which was probably intended for a corner of the contemplated survey, in the name of John Taylor, was in the boundary line of James Taylor, a well located warrant, older than the Nelson. Though not a corner of James Taylor, it was a landmark from which both

Treizyulny and Quay located James Taylor. It was on the ground then, when the Nelson warrant was laid, and must have been known to the deputy surveyor. Now if, instead of going upon the ground and actually marking the lines of the Nelson warrant, he adopted the Evans line on the north, and a line running north 58 degrees east from this old maple for the southern boundary, here was a location of the warrant which after thirty years would have been as actual an appropriation of the land as if the southern line had been well marked on the ground. Caul vs. Spring, 2 Watts, 390; Martz vs. Hartley, 4 Id. 261; Schnable vs Doughty, 3 Barr, 392; McBarron vs. Gilbert, 6 Wright, 279; Bellas vs. Cleaver, 4 Id., 267; and what greatly favors the presumption that he did adopt the old maple as a corner of the Nelson is the fact, that in the western boundary of this return of survey he called for the white oak which is an accredited corner of James Taylor."

This same question was once before in the Supreme Court of Pennsylvania. See Ira T. Clement vs. The Northumberland Coal Co., 6 Norris 291. In this case Clement was plaintiff below, and the dispute was about the identical land in question in this case, in which he claimed the land was within the lines of the Mary Myers survey. It was held that the marks between the Branham, the Mar in and the West were to be considered in determining where the surveyor located the line between these blocks n 1793. The Supreme Court say (page 293):

"The point strongly made in the oral argument against the instruction of the learned Court below we think is without a sufficient foundation in the charge, the Judge very correctly held that a subsequent survey could not control the lines of a former, but he did not leave the case upon this single instruction by omitting to inform the jury that the subsequent acts of the deputy surveyor in locating a junior warrant, and the marks left by him on the ground, might be considered as evidence tending to discover the actual location

of the older survey. On the contrary he answered the third point of the plaintiff below which raised the question very plainly, so as to bring the true distinction fairly before the minds of the jury. The point is clear, and he replied: 'Marks found upon adjoining surveys made about the time of the survey are evidence upon the subject of location, but they cannot control or enlarge the dimensions of an earlier survey, even though they may adopt its lines.' Thus the jury was left to locate the earlier survey by these marks if they should conclude that they indicated the true place of the earlier location; and were at the same time informed that the lines of a later survey cannot alter or enlarge the lines of a former survey, although the courses and distances of those former lines may be adopted. Certainly this was a fair instruction and brought the charge within the precedents cited. The difference between that which is evidence of a fact, and an effect which controls the fact is plain. Then when the Judge came to state the evidence of the marks found, he most distinctly referred to the pitch pine on the southern line of the Martin tract, and the post and pine as the material matter in determining the question as to the southern boundary of Mary Myers. In the next paragraph he refers to his answers to the points and leaves the question of the boundary as indicated by these marks to the jury."

The Pennsylvania Canal Co. vs. Kunkel, et al., Leg. Intl., Vol. 33, page 339:

"Upon a careful examination of the whole charge of the learned court below and of the bills of exception to the admission of evidence, we discover no substantial error therein. In truth, the question before the court was one of fact—identity of survey or location of the ground. In such a question upon an ancient survey, when witnesses are dead, landmarks gone and original facts left in uncertainty, ancient surveys having a connection with the one in dispute corresponding possession by others, landmarks nearly co-temporary, and

many other facts tending to throw light on the actual locality, are admitted to assist the jury in determining the true survey. They do not control, for once the true survey being ascertained, it may not be contested in its proportions by subsequent surveys or later landmarks, but the identity of the actual survey being lost through lapse of time, these evidences of former location may become powerful aids in determining where it was."

In the portions of the charge of the Court and answers to points complained of in the assignments of error, the learned Judge of the Court below, not only entirely disregarded or misunderstood the two decisions of the Supreme Court of Pennsylvania on this very question, but the well settled law of the State as to the weight to be given to official acts of the same deputy surveyor in locating adjoining surveys about the same time. He really charged the jury, that such evidence amounted to nothing in determining where the lines of older surveys were located originally on the ground, in this we submit, he committed manifest error.

In the eighth and ninth specifications of error (pages 194, 195, 196, 197 of the record,) he says, that to come to the "post by a pine" corner, the eastern line of the Martin must be extended thirty-two rods to overcome a mistake. There was no mistake to overcome. The line was run and the monuments placed there; the excess is about the same as in all of Gray's surveys, in the mountain regions, six per cent. was always allowed for roads and a liberal allowance was always made for unevenness of surface. Scarcely a single survey can be found in all that region which has not about the same excess in lines and quantity, even when run and marked upon the ground, this is known to every judge and lawyer acquainted with land trials.

Coulter, Justice, in Sweigart and Richards, *supra*, says: "This is a circumstance so common in the early surveys as to be of itself of small moment."

After stating the position of the defendant's counsel as to the location of the dividing line between these blocks of surveys, by a line run westward from the "post by a pine" corner, he says: "*To this method of locating the Brush Valley block we cannot assent.*" The Richard Martin being a junior survey cannot control or enlarge the dimensions of the Samuel Lobdil and other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what the deputy survoyor did in locating the Richard Martin, has been admitted in evidence and may be considered by the jury in connection with the other evidence in determining the question, *whether or not the chestnut oak and gums relied on by the defendant are trees marked by the surveyor in 1793.*

"But should the surveyor find that none of these were marked for the survey of 1793, then the Richard Martin can have *no weight* in determining the location of the Brush Valley block."

That is the work of the same deputy surveyor, and could be considered by the jury in determining the marks on trees, but not to indicate when the original line was run. The Supreme Court had twice decided, when only one line tree had been found on the Branham, that the work of the same deputy surveyor was evidence to be considered in determining when Gray or his deputy ran the dividing line in 1793.

In Clement vs. The Northumberland Coal Co., *supra*, the Supreme Court said: "Marks found upon adjoining surveys made about the same time are evidence upon the subject of location." The jury were left to locate the earlier survey by these marks if they should conclude that they indicated the true place of the earlier location."

In Northumberland Coal Co. vs. Clement, *supra*, 14 Norris, 138, the Supreme Court say;

"The warrant was located by the same surveyor and the

return of survey was made three days before the survey of the Billington tract was returned. It calls for the Samuel Lobdil on the west and the line between the two tracts is the same length in each survey. He had the warrants in his hands at the same time—the location of the latter throws light on the former. The location claimed by the defendant in error for the Billington is not only in harmony with the block of surveys, of which it forms a part, but also with the location of the Richard Martin, made by the same surveyor soon thereafter, without referring to the evidence more in detail.

We think it was sufficient to submit to the jury to find the true location of the tract and that it was properly submitted by the learned judge.

The charge of the Court below in this case is in the teeth of these two decisions on this identical question. The learned judge says, to this method of locating the Brush Valley block, *we cannot assent.* How could the jury be expected to *assent* to a verdict for the defendant, if the Judge wou d not? What use of a verdict, if he gave notice ahead that he would not allow it to stand? Of what need was the evidence if the line trees established the line without it, it was only in the absence of line trees in connection with the Donnel survey and Fisher's testimony, that it was needed, to indicate when the line had been located.

The learned Judge really charged the jury, that if the defendant did not need the evidence, then they might consider it, but if he did, it should have no weight.

In that part of the charge embraced in the tenth specification of error, (page 198, of record.) the learned judge ignored entirely all the evidence of what the same surveyor had done about the same time on adjoining surveys, all the monuments on the Branham and all the evidence in the case, except such as pertained to the chestnut oak and gums and the David Rockefeller, maple corner. He says, "should the evidence fail to satisfy the jury that said chestnut oak and gums, or

any of them, are trees marked for the survey of 1793, and should the evidence fail to satisfy the jury that the maple corner is where David Rockefeller located it, then the eleven surveys of the Brush Valley block *must be located* from their fixed corners upon the northern line of the block by running out the official courses and distances, as shown by the official returns of survey and the verdict *must* be for the plaintiff.

This was giving no effect whatever to evidence which the Supreme Court had said twice was sufficient to enable the jury to find the true line. When there was no question in the case as to whether a gum could be counted or as to the age of an axe mark or any tree upon the southern line of the defendant's block.

The same error is committed in affirming the plaintiff's second point in the the eleventh specification of error, (page 179 of record.)

Also in affirming the plaintiff's fifth point, (page 200 of the record) by which the Court charged the jury, that in the absence of marks on the southern boundary of the Brush Valley block, fixing it *definitely it must* be located at the end of the official distance from the northern line.

In the Judge's answer to the defendant's fifth point. in the fourteenth specification of error, (page 202 of record) the same error is more plainly committed. This point requested the Court to charge the jury that in endeavoring to ascertain the true location of the dividing line between these two blocks of surveys the jury might take into consideration the acts of the deputy surveyor in locating the Richard Martin and Ebenezer Branham, and that if the jury believed that the said two surveys were located on the ground at the place testified by the witnesses and that their respective west and northern lines were identical with the eastern and southern lines of the Lobdil, such face would be of importance in ascertaining the exact location of the Lobdil and the block of which it was a part. To which the Court answered that the jury might take into consideration these facts in determining

the question, whether the chestnut oak and gums were marked in 1793, but if the jury found that none of these trees were marked for the survey of 1795, these facts would be of no importa ce in determining the controversy. To the same effect is the answer to the defendant's tenth point, in the seventeenth specification of error, (page 205 of record) in which the Court said, that unless the chestnut oak and gums are found to be original, the "post by a pine" corner, a monument on the north line of the Branham, would have to cont ol in locating the line.

The same error runs through all these specifications.

The learned Judge seemed to have become impressed with the idea that unless monuments were found on the south line of the Elliott all the other evidence of the defendant should have no weight.

It must be recollected that the Brush Valley and the Richard Martin warrants were in the hands of the deputy surveyor at the same time, and that he held the eleven warrants until he had first exhausted his power over the Martin warrant by returning the survey into the Land Office. He returned the Martin survey three days before he did the eleven surveys comprising the Brush Valley b ock. Up to the time of the return of the Martin he could contract or extend its lines. When he returned it his power over it ceased. Hughes vs. Stephens, 7 Wright, 202. He first returned the Martin with a western line of 320 perches. He held the eleven warrants three days longer, and returned making a common line between these surveys of 320 perches.

Under the authorities cited the deputy surveyor might have several blocks of adjoing surveys in his hands at the same time, and by the adoption of lines and monuments which he had officially marked on the ground adjust these lines and return them to the Land Office. This is what he evidently did in this case. He had the Richard Martin and the block of eleven warrants in his hands at the same time; he had run the lines of the West and made the post

by a pine, and had marked the line trees south of the Martin, which gave him his return line not only on the south of the Martin but on the south of the Brush Valley block. After having done this he returned the Martin into the Land Office, and three days later returned the Brush Valley block. About eight months later he surveyed the block of which the Branham was the leading warrant, and re-adopted the same monuments upon the ground, not only at the east end of the Brush Valley block, but at the southwest corner of the Billington, near the head of the swamp, where Fisher swears he told him he made it in 1793.

Under all the evidence in this case it was manifest error on the part of the Court to not to submit this evidence fairly to the jury. The work of the same deputy surveyor on adjoining surveys made about the same time, and the declarations of the deputy surveyor who located these tracts as to where he had originally established the southern line, were clearly evidence of location. It requires but a reading of the charge and answers to points to show that the Court entirely disregarded it and withdrew it from the consideration of the jury.

In Sweigart vs. Richards, 8 Barr, 436; and in Bellas vs. Cleaver, 4 Wright, 260, it was held that work done by the same deputy surveyor on adjoining junior surveys, should be submitted to the jury as evidence of where the same surveyor intended to locate the lines of the senior. In those cases years intervened between the location of the senior and junior surveys. Here only days and months intervened, when the marks previously made by the *same surveyor* and his *axman* must have been fresh, not only in their memory, but upon the marked trees, when there could be no difficulty in retracing on the ground every mark made and every path walked by them. Again, the testimony of Fisher as to what Henry Donnell, who originally located these surveys on the ground, did and said a few years after while in the very act

of running the disputed lines, was certainly powerful evidence on the subject in dispute.

On this trial there was more evidence to submit to the jury than in the cases in which the Supreme Court held that it was sufficient not only to submit to the jury but to justify the verdict in favor of Ira T. Clement, and the Court should have submitted the evidence fairly for their consideration. Any one reading the charge cannot help coming to the conclusion that the jury, under direction of the Court, could not have rendered any other verdict than for the plaintiff.

S. P. WOLVERTON,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States

No. 143 October Term, 1887.

IRA T. CLEMENT,

Plaintiff in Error,

VS.

ELISHA A. PACKER.

Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Brief of Argument on the Part of the Defendant in Error.

Statement of the Case.

We regret to be compelled to differ with the learned counsel for the plaintiff in error in many of the statements of facts made in their "statement of the case."

On page 2 of their brief the following statement appears: "The same deputy surveyor, William Gray, located both blocks of surveys and returned them into the land office. *He had all the warrants in his hand at the same time, as well as the warrants surrounding both blocks and returned none of the warrants into the land office until after he had completed his work on the ground.*" The same statement is repeated on pages 3 and 5. As the defendant in error understands the practice of this court, no evidence will be considered

which is not incorporated into and made a part of the specifications of error, or referred to so as to make it a part of the specification. Otherwise the court will not look into the evidence printed in the record sent up. As there is no evidence of what warrants William Gray had in his hands at the time he surveyed and located the 11 Brush Valley surveys either in the evidence sent up or in any specification of error or in the charge of the court below, the statement that *William Gray had all the warrants in his hands at the same time, as well as the warrants surrounding both blocks* is not authorized by the record.

Nor is the statement warranted by the evidence sent up as part of the record.

On page 66, printed record, the old purchase voucher 12,969 for six tracts of land in the warrantee names of Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Ebenezer Branham and Nathanial Brown was given in evidence.

Also same page old purchase blotter 12,969.

1794, June 14, Dr. Thomas Ruston 6 wts. of 400 ea. am't 2400 a 50 spct. paid, spec. ch. £60, rec't d'd, fees 6, p. p'd., remr. ch. of 168 Ds.

The old purchase blotter shows the payment of the purchase money for the six warrants, to wit: Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Ebenezer Branham and Nathaniel Brown.

These warrants were not taken out of the land office until the 14th of June, 1794, and William Gray could not have had them in his hands, when he surveyed and located the Brush Valley warrants, on 2 and 3, Oct., 1793 as he returned the Brush Valley surveys on 3rd March, 1794, see certified copy of William Gray's return, printed record, page 64.

The practice in the land office in respect to the payment

of the purchase money before the warrants would be issued, is stated by Huston on Land Titles, page 323, in the following language: "I have reason to believe, and do believe, that after the 1st day of September, 1769, no warrant was sent to a deputy surveyor until the purchase money had been paid. The warrant, when made out, was dated on the day the application for it was entered, although the warrant itself was not filled up and signed and sealed until money was paid into the Receiver General's office."

Justice Washington, in Brown vs. Galloway, Peters, C. C. R., 291, said: "A warrant for land is, according to long and uniform practice, dated on the day the application is made for the land, although it is retained in the office until the purchase money is paid, when and not before it issues to the party."

In Lewis vs. Meredith, 3 Wash. C. C. R., 81, it was said: "After application is made, it is expected that the applicant will proceed with all reasonable speed to pay the purchase money, which being done, the warrant to the surveyor issues, *but not before;* and though it bears date as of the day of the application it is, in fact and in truth, a warrant of the day on which the money is paid. It is expected that he will, with all reasonable diligence, proceed to perfect his title, by having a survey made."

See also Oliphant vs. Ferren, 1 Watts, 57.

The warrants for the Elliott, Walker, Brown, Shannon and Branham could not have been taken out of the land office prior to 14th June, 1794, and therefore, they could not have been in the hands of the deputy surveyor at the time the warrants for the Brush Valley surveys, or the warrants for the surveys south of the LaFevre lands were in the hands of the deputy, but did not come into his hands until over four months after those surveys were returned

into the land office. See return on page 64, printed record.

This same question when the warrants to William Elliott, Lewis Walker, Nathaniel Brown, William Shannon and Ebenezer Branham, were taken out of the land office, came up in the case of Jane Herron, et. al. vs. E. A. Packer, No. 142 October Term, 1886, same defendant in error, and upon the same facts, to which we respectfully refer.

Again on page 3 in plaintiff in error's statement of the case they say: "*All the surveys in this neighborhood were made by Henry Donnell, a deputy under William Gray. A few days before he went on the ground to locate the Brush Valley block of surveys he had been there and had surveyed and located a tract of land for Francis West by virtue of a warrant dated January 3, 1793. This survey was well marked on the ground by him, and is located but a short distance east of the Brush Valley block. It was his evident intention to connect the Brush Valley block with this tract, as it was his only guide in that neighborhood, and as he had surveyed it upon the ground but a few days previous, its location must have been well known to him.*"

The statement that Henry Donnell, a deputy under William Gray, made all these surveys is mere assumption. We must assume that this statement is made upon the same authority as the statement of the same fact in their argument of 2 and 3 specifications of error on page 53 of plaintiff in error's brief. It is there stated upon the evidence of David Rockefeller, whose evidence was read and he stated that Donnell was one of Gray's deputies and in reply to a question, what part of Gray's district Donnell had? He replied: *I think pretty much all on this side of the river in the Shamokin coal region.* If "*pretty much all*" means all, then the conclusion would be warranted and the exclusion by the court below of the declarations al-

leged to have been made by Henry Donnell to John Fisher in 1814 or 1815 that "*twenty-one or twenty-two years ago we located these warrants,*" which is the second specification of error, did no harm, as the evidence was cumulative only.

The statement not only assumes that Henry Donnell was the *only surveyor* who located any lands in that broad district of country, probably forty to fifty miles one way, but it assumes that he must have intended to connect the Brush Valley block with the Francis West survey made some twenty-three days before, as the Francis West was the only guide in that neighborhood.

This guess work follows all through the argument of the various specifications of error, without any better foundation in fact.

The Francis West was located 308 perches east of the Samuel Lobdell. If Donnell intended to connect the Lobdell, ~~which~~ the eastermost tract of the Brush Valley block with the Francis West survey, he certainly must have lost both his compass and chain and did his work without either.

It is probably true that Donnell may have located many tracts on that side of the Susquehanna, but it is unwarranted assumption to contend that he located all in that vast district of country. Which surveys he located, and which were located by William Gray and his five other deputies in that district is mere conjecture of no practical moment or utility in this case.

For if we were to assume that he did locate them all, it does not follow that he did not make mistakes. For example, the Thomas Reese, Jr. survey located two days before William Elliott, lies right on top of the William Elliott, Daniel Reese and Charlotte Ruston, and the Joseph Tysor, one of the LeFevre block, lies northeast of Thomas Reese, Jr., on the Daniel Reese, Charlotte Ruston and William Elliott. The Ebenezer Branham survey, another

of the LaFevre block, calls on the north to adjoin John Houston on the eastern end of the tract, and represents a "post by a pine," as the southwest corner of the John Houston, and calls to adjoin the Daniel Reese on the north, and the "post by a pine" as the southeast corner of the Daniel Reese. The John Houston is called for where the Francis West is actually located on the ground, and the John Houston is actually located directly east of the Francis West and about 200 perches east of the east line of the Ebenezer Branham. The John Houston and the Francis West were located by marks on the ground September 10th, 1793. Where the Branham calls for the Daniel Reese on the north, the Richard Martin was located 22nd February, 1794, and the Daniel Reese called for, is one of the Brush Valley block of surveys and lies seven miles west of where the Branham calls for it. So it is quite evident that the same surveyor either did not locate all these surveys in that vicinity or else he made a great many serious mistakes. The books are full of cases, where surveys have been made by the same surveyor, within a short time of each other, so as to lap over and conflict with each other.

The Surveyor General had authority to appoint deputies, but the deputy surveyor had no power to appoint deputies under him. Every survey in the land office made by William Gray, who was the deputy surveyor, or any of his six deputies are signed by William Gray, by his own signature. Henry Donnell did not, nor could he make a return of any survey he made to the land office. Therefore, what surveys were made by Gray, or any of his sub-agents is mere conjecture—for after the lapse of ninety years there is no way of proving it and never can a necessity arise where that would be material.

William Gray had to return them all and assume the act

of survey as his own. The district of William Gray on the side of the river, claimed to be Donnell's territory, embraces a large part of Northumberland county, several townships now in Schuylkill county, and several townships (now) in Luzerne.

If, therefore, we once enter into the uncertain field of speculation, the end is always uncertain.

The learned court below said in reference to the testimony of some the surveyors of plaintiff in error who gave their opinion that the line around the Richard Martin was made when the Brush Valley surveys were made 2 and 3 Oct., 1793, when the warrant for the Martin was not taken out until the 22 of February, 1794, was a mere speculation for such evidence contradicted the official return of survey, and after the lapse of ninety years, it was impossible to say that the marks made on the ground which would count as well for the age of the Martin survey as for the Brush Valley surveys were not made for Martin, and the court might well have said that the lines corresponding with the date of the Martin were and ought to be presumed to have been made for the Martin. Again, on page 7, of statement, six reasons are given why the Rockefeller maple had never been a corner.

(1) The small maple or Rockefeller maple was not eight rods short of the official distance. The measurements of the different surveyors differed somewhat because of the rough and stony character of the ground. The Brush Valley lands extend from a high mountain where their north line was run, across a deep gorge through which Roaring Creek runs, runs up on the side two-thirds up the north side of another high mountain. The valley is very deep, and the sides of the mountain precipitous, and very rocky and covered with a thick growth of underbrush. Some of the surveyors measured this

line between the Billington and Reynolds to the Rockefeller maple the exact official distance. Mr. Cochran, one of the defendant in error's surveyors, on cross-examination testified to about the true state of facts—he made his measurements 3.7 tenths rods short, but in answer to the question: Q. "Didn't all the other surveyors, some of whom are dead, fix the maple sprout 8 rods short?

Answer. Some of them did, and some at the actual distance.

The charge of the court below recapitulates the facts as they appeared in evidence—see charge on page 133, printed record:

"By the measurement of the plaintiff's surveyors, who have been examined before you, the 'Rockefeller corner as it is now designated, is a little further north than his measvrements placed it. Mr. Cochran put it 3.7ths. rods north of the end of the cross line as officially returned. Some of the defendant's witnesses by their chaining make it to be several rods still further north. Mr. Moore's measurement makes it 7½ rods north of the official call for distance. The land at this place is mountainous and rough and in chaining it the surveys do not precisely agree as to distance."

(2.) The statement. (It is more than a half a degree out of the course of the line and six or seven rods west of where it should be), is not sustained by the facts. The line between the Billington and Reynolds was at the time of this trial a well marked and well defined line, by living monuments then upon the ground which have been blocked and counted back to the date of the original survey, and blocks of this line were produced in court by the defendant in error, and the small maple corner found by Rockefeller was directly in the course of this marked line, and as near to the official distance, as measurements over difficult territory like that would ordinarily agree. The old surveyors did not practice horizontal measurement. "(*Surface measurement is the only kind in practice by the district surveyors of this state, but in making that it is usual for the surveyor in chaining over an uneven surface to make allowance by elevating the chain.*"

See Boynton vs. Urian, 55, Pa. St. 152.

It was a matter of no consequence therefore, if the marked line was slightly out of its course, all the surveyors testified to its being a well marked line, and it is not denied on this trial, although on former trials the surveyors for the plaintiff in error had denied it and counted the marks all too young by one year. The facts connected with this cross line and the original marks made for this line, and the evidence in the cause relating to it is correctly summarized by the court below in their charge, in the following language: "In this connection we call the attention of the jury to the evidence relating to the original work found on the line running from northeast corner of the John Reynolds southwardly to the small maple, i. e., the division line between the Reynolds and the Billington.

The plaintiff has clearly shown, and, indeed, the defendant's surveyors, including some who testified to the contrary at former trials, state that that line is a well marked line of the date of the original survey of 1793. Moreover, it is the only cross line of the block upon which has been found any evidence showing actual work thereon by the surveyor. Now that the Reynolds-Billington line was actually run by the surveyor is a fact worthy of consideration; for it suggests that in returning the maple as 326 rods distant from the northeast corner of the John Reynolds, the deputy surveyor had ascertained the distance not by computation or protraction, but by actual measurement It is indeed true that chaining might not insure against mistake. Yet, the line having been actually run upon the ground by the deputy surveyor, we might fairly expect to find the maple at the end of the line, as officially returned, or within a reasonable distance thereof. One other fact here, (appearing from the uncontradicted evidence) seems to call for remark. All the marked trees on the Reynolds-Billington line are found north of the Rocke-

feller corner. No marked tree on the course of that line has been found between the Rockefeller corner and the point on the edge of the swamp at which the defendant locates the maple corner, although the distance is over 60 rods, and the line passes through timber old enough to bear the marks of 1793."

David Rockefeller, who surveyed these lands in 1847, says: "There is a chestnut oak witness to the corner, about eight feet west of the maple stump. This is the only living corner called for in the southern boundary of the Asylum's Company's lands, and the northern boundary of the LaFevre lands, and serves as a guide to this boundary for a long distance both east and west."

See his evidence pg. 59, Printed Record.

A. B. Cochran, a surveyor, and witness on the trial, in answer to the following question testified:

"Q. At that point state what you discovered, what you found there, when you were there in 1881?

A. We found a stone corner with a chestnut oak stump about eight feet to the northwest that had been broken off and fallen over, burnt and too much decayed to make anything out of it. We found a chestnut witness about a perch and four-tenths to the southeast of that, that counted 29 years to the time that it had been blocked previously by Strauch and Lewis, and which was a witness made by David Rockefeller."

"Q. Then from 1876 it counted back to when?

A. From 1876 it counted back to 1847."

See his evidence pg 28 Printed Record.

On the former trials the surveyors of the plaintiff in error had disputed this cross line, and the marks upon it, as a year too young, and they had established a line as they claimed according to the official course of the line, which would be at the southern point seven or eight

perches east of the marked line where Rockefeller found the original corner. The fact that the chestnut oak witness was but eight feet northwest of Rockefeller's corner, was we believe undisputed on the trial, but it was about eight perches from the line which the plaintiff in error claimed on the former trial, but which they had abandoned on this trial.

(4) We discover no evidence returned in the Record that there was a pine tree about 200 years old, which the surveyors would have marked instead of a small maple, at the exact official distance, in the exact course of the line between the Billington and Reynolds. The exact official course of the line differed from the marked line between the Billington and Reynolds, which would make the line by the exact course some seven or eight perches east of the recognized marked line, and it is the end of this abandoned line, which the plaintiff in error's surveyors had claimed as the true line on the former trial seven or eight perches away from the marked line of the southern corner of the Billington and Reynolds that this pine tree stood. As it did not stand in the course of the marked line, but eight perches away, it is not a tree that would have been marked in 1793 instead of the small maple.

(5) We must object to the statement that all the lines on the ground overrun in length considerably. As a matter of fact the evidence shows that some of the lines were a little shorter and some a little longer, than the official, and this we believe is generally the case of lines run over a territory stony, abrupt and through dense wilderness.

See A. B. Cochran's evidence, Printed Record, pg. 30.

(6) There was produced in court a small maple marked by Rockefeller as a witness to his corner in 1847, that was about 50 years old.

See evidence, Printed Record, pg. 33.

David Rockefeller testified that, "at 340 perches (from

the N. W. corner of the Thomas Billington) allowing for the hills, &c., a maple stump with sprouts growing around it. The tree had been burned and the stump was about a foot high. The tree was lying down as it fell, right down the mountain, and the trunk of the tree was burned entirely away for perhaps six or seven feet with the exception of two narrow scales about an inch thick that were burned on the inside—that is the description of the tree as near as I can recollect. Then I have said in my notes old corner maple stump. There is a chestnut oak witness to the corner, about eight feet west of the maple stump."

See Printed Record, pg. 59.

The main issue in this case was whether the 120 acres in dispute was a part of the William Elliot or whether it was within the surveys of the Charlotte Ruston and Mary Myers. The defendant in error owned the William Elliott and the plaintiff in error owned the Ruston and Myers.

The Charlotte Ruston and Mary Myers were two of eleven surveys surveyed and located by William Gray, the deputy surveyor, on the 2d and 3d of October, 1793, and returned into the land office 3d March, 1794. The William Elliott was one of six surveys. The warrants were dated 26th November, 1793, but were not taken out of the land office until the purchase money was paid on the 14th June, 1794, and were located on the 21st and 22nd of October, 1794.

There were no marks found to show that the surveyor had been on the ground to locate the Elliott, Walker or Shannon, and although some marks were found on the south line of the Richard Martin for 150 rods from the "post by the pine," an older survey than the Ebenezer Branham, which would also be the the north line of Branham. These marks were difficult to count and there were various theories by the surveyors as to what they belonged. But the surveyors of plaintiff in error claimed the line marked

for 150 perches from the "post by the pine" westward along the eastern part of the south line of the Martin were marks made for the Martin survey.

There was no evidence of any work upon the ground made for the LaFevre lands in their location and as they were located so as to call for and to adjoin older surveys on the north, south and east sides, it would have been improper to re-mark the lines of the old surveys called for. This does not make the LaFevre surveys what are known as chamber surveys, although the location may and probably was entirely chamber work. The only correct way therefore to locate the LaFevre lands was to put them in between the older surveys on the north and south and fill up that vacancy. This is well stated in the plaintiff in error's statement of the case, on page 2, as follows: "The northern line of the "Brush Valley block" was well marked upon the ground in 1793. So was the northern line of the lands south of the "Le Fevre block." The LaFevre, of which the Elliott was a part, was evidently placed between the Brush Valley block, and the surveys on the south, to appropriate vacant land which the deputy surveyor supposed lay between them, from his work upon the ground within a few months prior to their location."

In the absence of marked lines therefore the William Elliott, Lewis Walker, Nathaniel Brown and Ebenezer Branham must go to the calls on the north.

The question resolved itself into the question of the true location of the south line of Brush Valley surveys, and whereever that line was put by the deputy surveyor in 1793 the Elliott must go.

It was claimed that the Brush Valley was a block of surveys, and this was conceded by both sides on the trial.

The north line of the Brush Valley surveys were well marked on the ground. They extend about seven miles in

length. The cross line between the Billington and Reynolds was found well marked upon the ground, and David Rockefeller, Prof. Wm. F. Roberts. Frank Leisering and Samuel Adams all testified to finding in 1847 the southern corner at its official distance, on the south of the Billington and Reynolds where there is a small maple called for, for the corner, and a chestnut oak witness eight feet northwest from this corner which they blocked and counted to the date of the official survey, when they were surveying the lands for the owners. David Rockafeller was dead and his evidence was read from the notes of the trial, but Prof. Roberts, Frank Leisering and Samuel Adams were living and testified on this trial.

George W. West, one of the plaintiff's surveyors, testified that David Rockefeller showed him the maple stump in 1871. The maple had decayed.

The northern line and the cross line between the Billington and Reynolds are the only lines, as defendant in error claimed, ever run for these Brush Valley surveys, and the small maple corner south of the Billington and Reynolds is the only living corner called for on the south of the Brush Valley surveys, and there are sixteen other corners on the south of the Brush Valley surveys all of which call for post corners, which is very strong, if not conclusive evidence in the absence of other facts, that there never was a south line run for this Brush Valley block. The calls of this Brush Valley block on the south are for vacant land all along its southern line. The calls of the Elliott survey on the north is for the Daniel Reese, Charlotte Rustin, Mary Myers and part of John Reynolds. The calls for the Lewis Walker is for the eastern part of John Reynolds for "*the small maple corner*" on the south between Billington and Reynolds. for the Thomas Billington, Mary Ruston, and Thomas Ruston, and the calls for the Nathaniel Brown on the north is for the

Mary Ruston, Jr., and John Young; and the Ebenezer Branham calls on the north for the Joshua Bean and Samuel Lobdell and extending eastward beyond the Brush Valley block the Branham calls for the Daniel Reese and for a portion of the John Houston.

These calls for the Brush Valley survey by the LaFevre surveys fill up all the space between the old surveys on the south of the LaFevre lands and the Brush Valley lands on the north. There being no marked southern boundaries for the Brush Valley land and but one living corner called for on that line the defendants in error claimed that the true way to locate these lands, or in other words, to ascertain the true location as fixed by the deputy surveyor on 2nd and 3rd of October, 1793, was to start from the marked lines on the north and run out these surveys according to their courses and distances, which would fix the Rockefeller maple at the south of the Billington and Reynolds, as that corner was as near the official distance as reasonably could be expected for a line running over that kind of territory. And by that mode of location the land in controversy would belong to the defendant in error, as a part of the William Elliott survey. The plaintiff in error in order to overcome the presumption that after the lapse of twenty-one years without marked lines to control the survey, had two lines to their defence. The first was that they found a chestnut oak line tree 32 perches south and 140 perches west of the southeast corner of the Samuel Lobdell, as returned. As to the age and whether it was an axe mark in this chestnut oak the evidence is summed up by the learned court below in their charge as follows: "One of these is a chestnut oak at 140 perches westwardly from the southeast corner of the Samuel Lobdell, which tree was discovered and blocked by A. J. Guffy, one of the defendant surveyors

in the year 1879, and which Mr. Guffy, Mr. West and Mr. Boyer testified counted back to 1793.

T. W. Moore, however, one of the defendant's surveyors says he cannot say this block counted back to 1793, and he adds that he found nothing original on any part of the southern line of the Brush Valley lands.

A. K. White, a surveyor, testified that he counted this block at Lock Haven, on the previous trial, and that it counted but 82 years, which would make it too young by four years for the survey of 1793.

To the like effect is the testimony of Geo. B. Strauch and Robert Ammerman, surveyors, whose testimony at the trial at Lock Haven has been read in this case.

Wm. P. Mitchell also counted the block at the Lock Haven trial and he testifies that it counted but 82 years.

Here then is a direct conflict between the expert witnesses who have examined the block from the chestnut oak and the greater number testify that the count fell short of the survey of 1793 by 4 years."

This block was proved to have been in the possession of the plaintiff in error and was not produced on this trial.

And the learned court did not enumerate all the surveyors who testified that the mark on this tree counted but 82 years which would make it too young by four years to wit: A. B. Cochran, Wm. H. Chatham, R. McCully, W. A. Edeburn and Robert McAdams. Some of these testified that it was not an axe mark at all but a wind shake and was marked only on one side.

The plaintiffs in error further claimed on the trial that they had found original marks south of the Reynolds and Billington corner as found by Rockefeller sixty-one or sixty-two perches, and a stone heap around a small maple stump out of which had grown a maple sapling about 35 years of age, and a gum line tree about six perches west of the gum witness.

Trescott, one of their surveyors, swore that he blocked the gum witness, and claimed he could count it back to the original survey. Mr. West, another of the surveyors, was not positive, but thought it was original. The defendants in error had both these gums claimed as a witness and line tree, cut down and the whole section embodying what they claimed to contain the marks, were brought into court and exhibited to the court and the jury. Upon which there was a large amount of expert testimony to the effect that the gums could not be counted, and the one that they claimed to be the witness was not an axe mark at all. This branch of their case was fairly submitted to the jury as defendants in error claim under an impartial charge, and the jury disposed of it in the way defendants in error thought they ought to have done, and in accordance with the clear weight of the evidence on the trial.

The other line of their defence was that the Brush Valley block should be located by the younger and junior surveys lying at the east of and adjoining the Samuel Lobdell the eastern tract of the Brush Valley block. The Richard Martin warrant was taken out of the land office the 22nd of January, 1794, surveyed the 22nd of February, 1794, and returned into the land office 28th of February, 1794. It calls to adjoin the Samuel Lobdell, the eastern member of the Brush Valley block on its western line. The north line of the Samuel Lobdell extended eastward of the same course forms the northern line of the Richard Martin. The east line official of the Samuel Lobdell is three hundred and twenty perches. The Richard Martin calls to adjoin the Samuel Lobdell on the east, and the official length of the west line of the Richard Martin which calls to adjoin the Samuel Lobdell is also 320 perches. The Francis West a survey lying east of the Richard Martin has a southwest corner spoken of by the witnesses as the "post by a pine." The Richard Martin ad-

joins the Francis West which forms a part of the east line of the Martin and the corner called for on the southeast of the Richard Martin is the "post by the pine," being the southwest corner of the Francis West. There appears to have been a line run from the post by the pine northwestwardly along the southern side of the Martin a hundred and fifty perches. The official distance of the southern line of the Martin is 308 perches, this line at the distance of 150 perches west of the "post by the pine" ends at a pine tree marked on four sides as a corner and counted back to the date of the Martin, which would be also the same date as the lines of the Brush Valley, because the Brush Valley was surveyed in the fall of 1793, and the Martin in the spring of the next year. There were also several other trees along this 150 perch line that helped to determine its age. The pine corner at the end of the distance of 150 perches was the termination of this line. There was no surveys ever located of that date for which this pine corner could have been marked as a corner. Mr. Trescott, one of plaintiff's in error surveyors, called it a sight tree or a reference tree. Mr. Cochran one of the defendant in error's surveyors, accounted for that line of 150 perches on the south of the Martin as follows:

"Whoever located the surveys south of the LaFevre lands ran the line northward and marked a gum corner which is on the northwest corner of the Johnston Beasley track, and the northwest corner of the Lewis Walker surveyed in October, 1793, (not this batch but Lewis Walker of the lower batch) then I believe and have reason to believe from maps in my possession, that they continued that line northward to the south line of the Francis West, and then westward to the pine corner 150 rods west of "post by the pine," and then abandoned the survey."

The Johnston Beasley was a survey of March 17, 1794,

hence this line if made as Mr. Cochran believed would count back to 1793, and also bear the same date of the Martin survey.

The Ebenezer Branham survey, one of the LaFevre block calls on the east end to adjoin the John Houston survey and the Daniel Reese survey immediately west of the John Houston. These calls for the Houston and the Reese surveys by the Branham are mistaken calls, the John Houston lies about 200 perches east of the east line of the Branham, is older than the Branham and was surveyed 10th of September, 1793. The Francis West survey lies where the Houston is called for, and is a survey of the same date as the Houston. The Richard Martin survey of 22nd February, 1794, occupies the ground called for by the Branham as the Daniel Reese and the Daniel Reese is located about seven miles west and is one of the Brush Valley block. It is apparent that the deputy surveyor or whoever located the Ebenezer Branham supposed that the Daniel Reese was located in the place where the Richard Martin was located, and that the Reese was the eastern member of the Brush Valley block, whereas, in fact it is the western member and seven miles away. The Ebenezer Branham also calls to adjoin the Samuel Lobdell west of where the Daniel Reese is called for, and the Joshua Bean west of the Lobdell. The Richard Martin official distance of its east line, and the west line of the Francis West, which it calls to adjoin is each 250 perches and the actual distance is 282 perches, showing a mistake of the deputy surveyor in the length of that line of 32 perches. The west line of the Richard Martin is returned as of the same length as the Samuel Lobdell's east line, and the official distance of both is 320 perches. The corner of the "post by the pine" ~~which~~, is 32 perches farther south than the deputy surveyor supposed it was when he located the Martin. Under this state of facts the plaintiff

in error claims that the true way to locate the Brush Valley block is to begin at the "post by the pine" which is the southwest corner of the Francis West survey, and the southeast corner of the Richard Martin survey, and to run out the official course and distance of the south line of the Martin, and by ignoring the distance of the west line of the Martin which calls for 320 perches they would reach a point 32 perches south of the southeast corner of the Samuel Lobdell as theLobdell corner would be if run out its official distance from its north line. By that system of location they would extend the south line of the Lobdell 32 perches, and at the point south of the Billington and Reynolds they would extend the corner 61 perches further south than the official distance of the line between the Billington and Reynolds, and so on to the west line of the Reese, being the western tract of the Brush Valley block, the plaintiff in error would fix the northwest corner of the Daniel Reese 86 perches further south than the official length of the western line of the Daniel Reese. This principal of location is predicated upon the theory, that the Richard Martin was located by the same deputy surveyor, that located the Brush Valley surveys, and his locating the junior warrant of Richard Martin to adjoin the Samuel Lobdell was in the nature of heresay evidence in regard to boundary, as the declaration of a deceased surveyor, and was entitled to some weight in determining the location of the Brush Valley lands. The court left this question under proper instructions to the jury,who found against the theories of the plaintiff in error. The court below held, and very properly, that the calls of a younger survey could not change, enlarge or alter the lines of an older survey, and that is not only a well settled rule of law in Pennsylvania, but it is obviously good common sense. But as the lines of the Samuel Lobdell and the Richard Martin where they adjoin are precisely the same length as

returned and start at the same corner on the north end. As there were no marks made for either for the southern corner, it is obvious that the south corner should be 320 perches from the north line. If a line were run beginning 32 perches north of the "post by the pine" where there is a clear mistake of 32 perches in the length of the western line of the Richard Martin, and extended westward along the southern line of the Richard Martin its course and distance, it would reach the corner of Samuel Lobdell just 320 perches from the north line of the Lobdell, and fix the south line of the Lobdell just according to its official return and where the defendant in error claimed that the deputy surveyor in 1793 put it by his returns into the land office. This branch of their defence is the one that the plaintiff in error seems to press strongly upon this court. They further argue if they could not draw the south line of the Brush Valley surveys down to their line as they would run it from the "post by the pine," then they claim as the Ebenezer Branham survey calls for the "post by the pine," The LaFevre surveys must be located as a block, and should be run out as a block, by starting from the "post by the pine" and running the courses and distances regardless of the calls for adjoining surveys.

This would leave a vacancy between the Brush Valley and the LaFevre blocks. This mode of locating is subject to two legal objections. 1st., Of which is, it requires a change in the location of the Brush Valley blocks as returned by the deputy surveyor, and that change is to be made, not by what was done by the deputy surveyor in locating the block, but by what appears upon the ground as the work of the deputy surveyor, at some other time, and upon land which had no connection whatever with the Brush Valley block. The 2nd objection is, that the calls for adjoiners must be wholly disregarded in favor of

the courses returned. These objections to the mode of locating the two batches of surveys drawn into the controversy in this suit is fully stated in the authorities cited, and in the change of the court to the jury, which was a clear and lucid statement of the law of Pennsylvania as settled by the Supreme Court of that state.

The rule is that a survey must answer all its calls if possible, and there is no difficulty in this case in the surveys of the LaFevre block located as a block in answering all the calls for older surveys and lines and courses called for on the east of the Brush Valley block except a slight change of the course of one line of the Branham and also in answering all of the calls of the LaFevre block on the north of the surveys of the Brush Valley block. And under the facts submitted by the court to the jury and the legal instructions given by the court to guide the jury in their investigation of the facts in evidence, the jury so located the LaFevre block as to adjoin the Brush Valley block.

Argument for Defendant in Error.

THE FIRST SPECIFICATION OF ERROR.

The first specification of error is to the rejection by the court below of the offer of the plaintiff in error of six patents issued by the Commonwealth to Peter Grahl for the Joseph Tyson, William Elliott, Louis Walker, Wm. Shannon, Nathaniel Brown, and Ebenezer Branham surveys bearing date the 12th and 13th of April, 1797, and the 17th of August, 1797, respectively, for the purpose of locating and showing that the Commonwealth confirmed the location of said surveys as a block by granting patents to

(each) one of them and also for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys."

This was objected to by the plaintiff below upon the ground that he claims under Dr. Ruston, who by virtue of the payment of the purchase money on the 14th June, 1794, was the owner of the surveys; that this title began with the payment of the purchase money to the Commonwealth and location of the lands upon the ground 21st and 22nd of October, 1794. That the patents appeared to have been issued to a stranger and show no connection between himself and the warrantees or Dr. Ruston, and therefore the patents are not evidence as against Dr. Ruston or those claiming under him for any purpose whatever; the patents are not evidence upon the subject of location in any event, the question of location must necessarily be determined by what the deputy surveyor did on the ground in making the official survey, at the time he made it. The patenting is no part of the location or survey of land. The officers who make out the patents have no authortity to make surveys. The defendant in error might safely rest the question raised by this assignment of error, upon the fact that the plaintiff in error have no copies of the patents in the record returned nor does the assignment of error contain copies so as to inform the court of their contents or materiality.

If copies had been made a part of the assignment it would have appeared that the description in the patents correspond exactly with the description of the official return of survey in each case, and hence the patents would have been, if admitted wholly immaterial, as they would not have changed the rights as established by the official return of the deputy surveyor in evidence. Even if the

patents were competent evidence for the purposes offered it would have been commulative only and was not such error as this court would reverse for excluding the evidence.

Cannon vs. Pratt, 99 U. S., 619.

The 2d paragraph of rule 21st, of this court requires "that when the error alleged is to the admission or the rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected" and by paragraph 4 of rule 21st, "when there is no assignment of errors as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded."

As the description of the land by those patents could be the only material part bearing upon the question of the location of the land described therein, the failure of the plaintiff in error to embody the description in the specification of error and as a part thereof, so as to disclose to the court the facts, so this court can judge of the materiality of the evidence, renders this assignment fatally defective.

The assignment as it now stands simply complains that the court below rejected certain papers called "patents" issued to Peter Grahl for the six tracts named. What land, if any, these patents describes, how they describe the land or what amount each tract contained, we are left without any information whatever. There is nothing in the assignment of error nor in the record returned to show what was in the patents.

To fully understand, however, the merit of this question the relation of the parties in this suit to these patents may be material.

The plaintiff in error does not claim any of the six tracts, four of which, to wit: William Elliott, Lewis Walker, Na-

thaniel Brown and William Shannon are owned by the defendant in error and the other two surveys in the name of Joseph Tyson and Ebenezer Branham were and are claimed by strangers to both parties here. The patents therefore were not offered as an element of title to any land claimed by the plaintiff in error or to show acceptance of the surveys or any matter which a patent is competent to prove, but for the purpose of effecting the location and quantity of land, to which the plaintiff in error make no claim.

The defendant in error claimed to own four tracts, to wit: the William Elliott, Lewis Walker, Nathaniel Brown and William Shannon; the land in controversy is a part of the Elliott.

He deduced his title from Dr. Ruston who on the 14th June, 1794 took out the six warrants and on that day paid the purchase money to the Commonwealth. Surveys were made on these warrants in 1794 and returned the same to the land office. John Gibson obtained judgment against Dr. Rustin in Circuit Court, U. S., for Eastern District of Pennsylvania, to No. 44 Sept. Term 1796 on 13th October, 1796, for £3735, 8 shillings and 4 pence. This judgment was revived in 1801 and after condemnation ven. ex. issued and these six tracts were sold in 1803 to Nicholas LaFevre to whom a marshall's deed was duly acknowledged, and from LaFever's administrator by sundry mean conveyances the title to four of these tracts became vested in the defendant in error, to wit, the Elliott, Walker, Brown and Shannon. It will be observed that the judgment against Dr. Ruston became a lien on 13th October, 1796, and the patents offered were not issued until April and August, 1797. Hence the marshall's sale of the land under the judgment divested any title under the patents. If any title passed thereby which defendant denies because the patents could only have been issued

to Dr. Ruston or those claiming under him. The defendant in error therefore did not claim under these patents, but claimed that they were issued in fraud of Dr. Ruston's right, were void as against his title and inured to his (Ruston's) benefit. The defendant in error was not therefore only not bound by these patents and as the plaintiff in error have no possible interest therein, their introduction into the case could have served neither a good nor material purpose.

If we assume that the patents had been regularly issued and were in the line of the title of the defendant in error, the patents would not have been evidence to locate the land.

Under our system in Pennsylvania in 1794 the warrant and survey thereon and return of the survey to the land office was the exclusive mode of granting the lands of the Commonwealth, excepting surveys allowed to actual settlers under act of April 3, 1792.

The patent which passes the legal title out of the Commonwealth is so merely a perfection and confirmation of the title by warrant, that if the wrong party receives the patent, he is always treated as holding in trust for the warrantee or the true party under him. It has often been said that the question is "*not who has got the patent but who ought to have it.*" And that question is settled by the state of the title under the warrant and survey.

The Delaware & Hudson Canal Co. vs. Dimock, 11 Wright 397.

The late cases in Pennsylvania have more definitely defined the value of patents as evidence to determine the quantity of land embraced within an official survey.

The Supreme Court in the case of Watson vs. Jones, 85 Pa. St. Rep. 125, holds "the only reason given by the court for its preference is that the patent for tract No. 4824 in-

dicates, as the initial point of its description, the post at the northeast corner of the Mead Survey, No. 5250; that is, at the end of the line 583 rods northeast from the pine. But this is not sound; for the patent but follows the survey. If there is an error in the survey, it is repeated in the patent; and at all events, the marks upon the ground must control as well the description found in the patent as that found in the survey."

The patent is made up in the land office from the official survey returned by the deputy surveyor. There is no re-survey and the act of issuing the patent is necessarily after the survey, and in pursuance of it. The patent has no office or part in the location of the lands for that necessarily precedes the patent and is the act of the deputy surveyor, whose duties are defined by statutes, and the patent is issued by the officers in the land office who are ministerial officers only, and who have no part or duty in surveying the lands, fixing their boundaries or ascertaining the quantity.

A patent for unwarranted land will not pass the title even as against the subsequent warrantee. The patent is but a confirmation of the title by warrant and survey, if it embraced more land than surveyed, it is void for the excess as against a subsequent warrantee. Delaware & Hudson Canal Co. vs. Dimock, 45 Pa. S. R. 393.

Manhattan Coal Co., vs. Green, 23, P. F. Smith, 310.

A patent which embraces land not included in the survey is void for the excess.

Kelly vs. Graham, 9 Watts, 116.

Though a patent conveys the legal estate against the Commonwealth, it will not prevail over a prior estate by warrant and survey.

Maclay vs. Work, 5 Binn. 154, 6 Sergt. and R., 118.
Woods vs. Wilson, 37 Penna. St. R., 370.

Patent does not locate the tract, but defines how much land the tract is to contain when located.

Hagerty vs. Mathers, 31 Penna., St., 348.

A patent enures to the benefit of the owner of the title, though issued to another.

Urket vs. Coryell, 5 W. & S., 60.

Patent is not notice of the equities of a prior owner of the settlement right.

Woods vs. Wilson, 37 Penna. St. R. 379.

If a man wrongfully obtain a patent for land and pay the taxes, the real owner may recover it from him without reimbursing to him the costs of patenting and the taxes.

Urket vs. Coryell, 5 W. & S., 60.

A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than that of him who obtained the patent, and for that purpose may inquire into the prior title of the patentee, whether by warrant, survey, settlement or otherwise, and show that his equitable title is better. Such patent may be impeached if tainted with fraud, procured by imposition, or in entire excess of the proceedings in which it is founded.

Balliet vs. Bowman, 5 W. & S., 155.
Smith vs. Vasbinder, 77 Pa. St. R., 130.

A patent is but prima facia title against prior claimants, and that a purchaser without notice of prior title and for value from the patentee, is in this respect, in no better position than the patentee.

Woods vs. Wilson, 1 Wrights, 382.
Lewis vs. Bradford, 10 Watts, 76.
Duer vs. Boyd, 1 S. & R., 203.
Urket vs. Coryell, 5 W. & S., 60.
Maclay vs. Work, 5 Binney, 154.
Gingrich vs. Foltz, 7 Harris, 40.

SECOND AND THIRD SPECIFICATIONS OF ERROR.

The second specification of error was an offer of a deposition of John Fisher taken in several cases pending in Northumberland county between the plaintiff in error and the Northumberland Coal Company in 1878. The plaintiff in error offered this deposition to prove by John Fisher that in 1815 Henry Donnell, a surveyor, was surveying the Brush Valley block and the witness, John Fisher, was employed to assist in making the survey. That when they were running a line between the Billington and Reynolds and were at the point fifty or sixty perches farther south than the official distance, Donnell came to a stone heap, and that Donnell said "he located these warrants twenty-one to twenty-two years ago." The court sustained the objections to these declarations of Henry Donnell and rejects those portions of the depositions embraced in brackets. The portions in brackets rejected are on the 152 and 154 pages of Printed Record, and are as follows: Donnell said, ("while there at the corner that twenty-one or twenty-two years ago we located these warrants"), and at another place, all Donnald said was, ("this is the corner. Here is where we located these warrants twenty-one or twenty-two years ago. This was when we were running the line between the Billington and Reynolds." Donnell said, ("It was that line; I knew it was that line.") The corner which Fisher testified to was a stone-heap fifty or sixty perches farther south than where the corner should be according to the official distances, and is not at the corner called for in the official papers for the official corner was a small maple; there is no such corner as a "stone heap" at this point called for in any official papers connected with this land and it was fifty or sixty perches further south than the Rockefeller maple corner, and that distance further than the official

distance. The third specification of error is to the offer to prove by general reputation among the surveyors who are acquainted with the land in the vicinity of the Brush Valley block, and in that neighborhood that Henry Donnell was assistant under the party who made the survey and who was reputed to have surveyed the lines in Shamokin township, Northumberland county, in 1793 and 1794 to be followed by the testimony of John Fisher as contained in his deposition that he, Fisher, assisted Henry Donnell to survey the lands in dispute in 1814 and 1815 and while actually engaged in the survey, when at the south end of the line between the Billington and Reynolds that Donnell said at that time in connection with his running these surveys and when actually engaged thereon, that twenty-one or twenty-two years ago we located these lines, and that Mr. Donnell said "this is the corner, pointing to the corner as claimed by the defendant." There was no such person as an assistant to the deputy surveyor, known or authorized by any law of Pennsylvania, that no such officer had a right to make any surveys or return them to the land office, but that the whole duty was imposed upon the deputy surveyor and although it is possible he employed assistants, and such assistants may have done work upon the ground, it nevertheless had to be returned by the deputy surveyor and in the name of the deputy surveyor. The deputy surveyor was an officer and his appointment was regularly made out generally each year by the Surveyor General, and the deputy surveyor had no authority to delegate his authority to other persons to act in his stead. The offer therefore was not to prove by general reputation that a certain public officer was discharging the duties of his office in 1793 and 1794, but that a person by the name of Henry Donnell was reputed to have made surveys which were returned in the name of William Gray who was at that time legally ap-

pointed deputy surveyor. William Gray's appointment as deputy surveyor could have been proved by a copy of his commission to be found in the land office of Pennsylvania and that there was therefore no necessity to resort to general reputation to prove this authority, but even if reputation would be evidence to prove that Gray located surveys and acted as a deputy surveyor de facto in 1793 and 1794, the principle would not apply to the case of Henry Donnell who was not a public officer and whose position was only that of assistant to William Gray. The rule therefore that allows the proof that a public officer has acted notoriously, as a public officer, without the proof of his appointment and induction into office is applicable only to the case of public officers as such. And in all such cases the proof must be made by persons who knew the fact; it may not be necessary to call the officer himself, but it would be necessary to prove the fact by witnesses who did know the fact that the officer held and exercised the office.

1 Greenleaf Ev., sec. 83.

1 Phillips' Ev. pg. 592 and N. (4 Edwards Ed.)

It is said in the note of 1st Phillips on Ev., (4th Ed. by Edwards pg. 593), "as to what evidence shall be sufficient to make out that a person is an officer de facto, and thus preclude an inquiry into the validity of his appointment or election, no precise rule of a general nature can be drawn from the authorities; for each case must necessarily depend, in some degree, upon its own peculiar circumstances. In Wilcox vs. Smith, (5 Wend. 231, 234), Sutherland J., delivering the opinion of the court says: 'The mere claim to be a public officer, and the performance of a single or even a number of acts, in that character, would not perhaps constitute an individual an officer de facto. There must be some color of an election or appointment, or an acquiescence on the part of the public for a length of time

which would afford a strong presumption of at least a colorable election or appointment.'"

This rule is applicable only to public officers; where the office is private some proof must be offered of its existence, and of the appointment of the agent or incumbent. Short vs. Lee, 1, Jack. S. & W. 464-468.

By the Act of 9th of April, 1781, 2nd sect., the Surveyor General of the Commonwealth was authorized to "appoint a deputy or deputies in any county of this state who shall have power to make and return into the land office surveys of land only in the county for which such deputy or deputies shall be appointed, for the conduct of which deputy or deputies the Surveyor General shall be responsible." 2, Purd. Dig. 1025 Pl. 2.

By the Act of 8th of April, 1785, 11th sec., the deputy surveyors were bound to give bond with two sureties in one thousand pounds for the due and faithful discharge of his duties according to law. And were also required to take an oath or affirmation that they would do and perform the duties of the office of deputy surveyor with fidelity and impartiality to all men. 2, Purd. Dig. 1025, Pl. 3.

The deputy was bound to perform these duties in person. For no provision was made or authority given to him to appoint deputies under him. He could not delegate his authority to agents or deputies, and this the practice of the land office conclusively shows, for every return must be, and is certified by the deputy surveyor in his proper person, and under his own signature. It follows from this that if William Gray, the deputy surveyor for Northumberland county, in 1793 and 1794, did employ Henry Donnell to survey lands for him in Shamokin township, Henry Donnell was invested with no official character and had no official authority. In fact and in law he was no higher than a chain carrier. He was unknown to the

land office and could make no return of his work to the land office. All his work was as the mere agent of William Gray, who was alone responsible to the Surveyor General, and who only could return it to the land office.

Henry Donnell, therefore, was of no more importance than an axe-man or chain-carrier in connection with the making of the surveys. As an employee, simply, under the deputy surveyor he had no power to do any act or to make any declaration to bind the Commonwealth or the warrantee, and what he did or said even in the execution of the warrants would not be res gestae. The adoption by William Gray, as his act, gives official character to what work appeared upon the ground, and only as having been done by William Gray, for he must certify in his return that the survey was made by him. The rule of evidence, as before stated, that you may prove by reputation that a public officer acted notoriously as such, in a public office, without producing in evidence the written evidence of his appointment or election, applies only to public officers and in such cases the evidence of reputation must be by witnesses who had a personal knowledge that the officer was notoriously performing the duties of the office. It is not necessary to prove these facts by the officer himself, but any other person who knows the fact may prove it. This is original evidence and not tradition. This rule of evidence is confined to public officers, and has no application to the case of a private individual, such as Henry Donnell was.

The offer to prove by general reputation by surveyors, who were acquainted with the lands in the vicinity of the lands in question that Donnell was reputed to have been a deputy surveyor under William Gray, and that he surveyed and located these lands and not Gray, was not admissible because that kind of evidence was incompetent to estabtablish the facts offered to be proved.

The learned court below was justified in ruling it out.

(a) Because the offer was not to prove the *de facto* occupancy of a public office.

(b) Because it was to prove a specific fact which can be proved only as *res gestae.*

(c) Because the fact offered was narative of a past transaction.

(d) Because the evidence contradicts the official return of William Gray, the deputy surveyor. In regard to this latter—the return of William Gray calls for a small maple corner at the distance of 324 perches from the north line of the John Reynolds and the Thomas Billington calls for a small maple at 342 perches from its north line. The stone heap which John Fisher says Donnell pointed out to him was fifty or sixty perches further south than the re-return of survey calls for the corner. The corner called for is a maple corner and the corner pointed out was a stone corner. If William Gray had been put upon the stand instead of John Fisher, he would not have been permitted to swear away his official return twenty-one or twenty-two years after he had made and returned his survey, and after all control over his return had passed out of his hands. It would be a fraud upon the parties interested, a fraud upon the law, a violation of his duty and oath of office, and subject titles to lands which under the laws regulating the survey and return of lands rest upon written evidence, to be swept away by the oath of a single person, and that person not under oath and under bonds to "perform the duties of his office with fidelilty and with impartiality to all men." How much less then can a mere employee under the deputy by declarations of past transactions contradict his own work by statements not made under oath, by which he destroys titles which are required to be evidenced by writings at every step from the in-

ception to the completion, deceives his employer and defrauds the warrant holders.

The courts of Pennsylvania have advanced step by step as necessity required to make the written evidence of the survey and return in the land office conclusive evidence that in the absence of marks found upon the ground, the lines returned were the ones made upon the ground. And after twenty-one years this was a presumption "jure et de jure."

What brittle straws these legal principles would be if the evidence offered in the 3rd and 4th specifications of error was admissible.

This court has decided this point in a case which came up from the Western District of Pennsylvania. In the case of Barclay and others vs. Howell's lessee, 6 Peters, 504. This court held "the declarations of a surveyor which contradict his official return are clearly not evidence; nor ought they to be received where he has no power to exercise a discretion as explanatory of his return while he is still living, and may be examined as a witness."

The deposition offered did not show nor did the offer propose to show that Donnell was in 1814 or 1815 surveying the lines for the owners of the land. This of itself was fatal to the offer. Woods vs. Ege, 2 Watts, 333.

In running the lines in 1814 or 1815, by Donnell, he blocked no trees nor done any act to determine the age of the lines. A "stone heap" corner was not called for in the official surveys and such as no age or permanency can be drawn from it—such a corner would not justify the extention of the lines one rod much less sixty rods. It was not the corner relied upon by the plaintiff in error.

The objection to the declaration was that it was not explanatory of any matter or act that then transpired upon the land as explanatory of the principal fact, but were declarations of past transaction and no part of the

res gestae. The declaration was not of what was then and there found upon the ground in 1814 or 1815, but was narrative of what was done 21 or 22 years before. The learned court below did admit the evidence in the deposition of John Fisher that Henry Donnell in the survey of 1814 or 1815 did point out the stone corner as the southern corner of the Billington and Reynolds.

See printed record, page 152, where Fisher swore "when we got to this corner Mr. Donnell said here is the corner," pointing to it, and all through Fisher's deposition he speaks of this corner as the corner shown to him at that time by Henry Donnell. It was only that part of the deposition, which is contained in brackets on printed record, 152, 153, where Fisher gave his conversation with Donnell, relating to what Donnell had said about what had been done in the location of these surveys 21 or 22 years before, which was rejected. In the argument of the plaintiff in error, the learned counsel says on page 61 that Fisher pointed out the corner near the swamp which Donnell had declared to be the corner, and the line in 1814 or 1815, and refers to evidence of Fisher taken on the former trial and printed on page 110 of printed record; that evidence was received by the court without objection by the defendant in error, but is not made part of any exception or specification of error, or referred to so as to make it material in the discussion of this question, but what Fisher did say in his deposition when he went with Clements and his surveyors to point out the spot where Donnell had fixed the south corner of the Billington and Reynolds that he pointed out the spot where it had been, but when he was there with Clements' surveyors, the corner had disappeared that Donnell had shown to Fisher in 1814 or 1815. See Fisher's evidence, 153 printed record.

Also the learned counsel for the plaintiff in error in the discussion of the second and third specifications of error,

refers to the evidence of David Rockefeller and says that Rockefeller proved that Donnell originally located the Brush Valley surveys but this is a conclusion of the learned counsel rather than a fact proved by Rockefeller but as Rockefeller's evidence is made no part of any exception or specification of error, or referred to by any specification of error, this court will not look into Rockefeller's evidence to ascertain whether he did or did not say so.

Having sufficiently discussed the offer contained in the third specification of error to prove by reputalion by surveyors that Henry Donnell originally located the Brush Valley lands we now proceed to discuss the general question raised by specifications of error two and three, as to the rejection of that part of the deposition of John Fisher contained in brackets.

The text writers lay down the rule that traditionary evidence is sometimes admissible upon the subject of boundary, but there is no exception to the rule, that hearsay evidence is inadmissible, in favor of traditionary evidence merely as applying to boundary, where the fact is particular and not of public or general interest. Accordingly though evidence of reputation is received in regard to boundaries or parishes, manners and the like, which are of public interest, and generally of remote antiquity, yet by the weight of authority and upon better reason, such evidence is held to be inadmissable for the purpose of proving the boundary of a private estate, when such boundary is not identical with another of a public or quasi public interest. Where the question is of such a general nature, whether it be of boundaries or of right of common by custom or the like, evidence of reputation is admitted only under the qualifications already stated requiring competent knowledge in the declarant or persons from whom the information is derived, and that they

be persons free from particular and direct interest at the time and are since deceased.

1 Greenleaf Evidence, par. 145;

1 Phillips Ev. page 230–1 (4 Ed. by Edwards).

On the other hand, declarations of a particular fact respecting a private boundary are receivable in evidence only when the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. Such declarations are only admissable as res gestae, and only when it appears that the party whose declarations are offered is dead, and is proved to have the requisite knowledge of the fact outside of the declarations of the deceased party. These principles, we think, are established by authority, both of this court and by the decisions of the Supreme Court of Pennsylvania. This question has, on various occasions arisen in this court, and the question has been ruled and has been determined against the admissability of the evidence contained in the offers of plaintiff in error.

In case of Ellicott vs. Pearl, 10 Peters, 412, this court held, "At the trial of the writ of right, in the Circuit Court of Kentucky a witness was offered to prove that one Moore, who was dead, and whose name was put down as one of the chain carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor, Kincaid, when the original survey was made, and the line run by the direction of the surveyor, for the original survey. The Circuit Court rejected the evidence. Held, that the Circuit Court did not err in rejecting this evidence. The evidence was not merely hearsay; but hearsay not to matters of general reputation, or common interest among many."

The above authority was referred to and quoted with approval by this court in the case of Hunnicutt vs. Peyton, 12 Otto, 333, where the same question was involved, and so completely covers the questions involved in this present case that we take the liberty of quoting from the opinion of Mr. Justice Strong at some length: "That Moore had made the survey, or that he had ever been upon its upper line, or on the upper line of the reserve, is proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde* Whether he had any knowledge of the facts whereof he spoke to Chriesman, is known only from his own statement."

Again: "Moore's declarations had no reference to reputation in the neighborhood. They are not to be confounded with proof of reputation—proof of what the community thought, believed or said. As repeated by the witness, it was mere heresay, the unsworn declarations of a deceased person respecting a particular fact not of a public nature. We do not question that declarations by deceased persons, of reputation respecting ancient public boundaries are admissible, and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a limited class of cases, a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof of reputation is open to rebuttal by witnesses. Not so with declarations of a particular fact respecting private boundaries. They are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the res gestæ.

In Ellicott vs. Pearl, 10 Pet. 412, we find a case which bears strongly on the present. In that case which was a writ of right for a tract of land, in which the location of a

survey was a matter in controversy, a witness was offered to prove that one Moore, who was dead but whose name was put down as one of the chain carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor when the original survey was made, and the line was run for that survey. The evidence was rejected, and this court ruled, correctly rejected, though the declarations offered were made by one who was proved by other evidence to have assisted in running the line. This case is instructive, and we believe it is in harmony with the rule generally enforced in this country. It certainly is in accord with the rulings of the English courts.

It is true that in several States of the Union decisions have been made recognizing the admissibility of declarations of deceased persons, even though they were statements of particular facts and in regard to mere private boundaries; but many of them, perhaps most of them were admissible on other grounds, either as parts of the *res gestae* or declarations of parties in possession. We think such is not the preponderant weight of decision. In Massachusetts, where the subject has been much discussed, it is held that, to be admisssble, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries. Bartlett vs. Emerson, 7 Gray, 174; Daggett vs. Shaw, 5 Met. 223. And again in Long vs. Colton, 116 Mass., 414, when it was said that it is an element not to be disregarded, especially where the question is one of private boundaries, that the declaration was made while in the act of pointing out the boundaries on the declarant's land. The declaration derives its force from the fact that it accompanies and qualifies an act, and is thus a part of the act. A similar ruling was

made in Bender vs. Pitzer, 27 Penna. 333. We will not undertake to review the vast number of decisions of State Courts upon this subject. It would greatly protract this opinion. Some things may be deduced from them, which, though not universally recognized, are the conclusions to which we think a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made.

To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence."

Also see Mimaqueen vs. Hepburn, 7, Cran. Reports, 290.

These authorities rule this question so decisively against the plaintiff in error that it would seem like an effectation, to refer to further authorities upon the subject. But it is claimed by defendant in error that the rule in Pennsylvania, upon the same question justify the ruling made by the court below. In the case of Woods vs. Ege, 2 Watts, 333, the Supreme Court of Pennsylvania reviewed at length the questions involved in the plaintiff's offers two and three, and reviewed a number of the authorities cited by the plaintiff in error, and explained and qualified them, and we quote a portion of the opinion in that case. Kennedy J. said:

"It has been argued, that the connected draft in this case was admissible as evidence of boundary; that the declarations of Wallace the surveyor who ran the boundary

lines in making the survey, made by him at the time he was employed in doing the work, he being dead, would have been admissible; and that the connected draft made by him is at least equivalent to such declarations. In support of this the decision of this court in Kauffman vs. The Cedar Spring Congregation has been vouched. I have already shown that the declarations of Wilson in that case were admitted for the purpose of impeaching his principal, the deputy surveyor, who had acted unfairly towards the warrantees in altering their survey. But nothing of the kind is pretended in this case.

The declarations of tenants or occupants of lands, so far as they relate to the tenancy or possession, have been and doubtless may be admitted as evidence; so the declarations of a person claiming land, or of those through whom he claims, made by them while they held the land, are likewise admissable. But then this is not upon the principal that the fact to be established is boundary; and therefore hearsay evidence may be received in regard to it. It is upon the ground, that they are the admissions of a party against his own interest, which have ever been deemed evidence of the highest grade in law, and held admissable in both criminal and civil cases. 1, Phil. Ev. 197, Dunlap's Ed. In questions of boundary, where the public have an interest, as between parishes and the like, hearsay evidence is admissable. 1, Phil. Ev. 197, Dunlap's Ed. But it may be questionable how far the declarations of persons having no interest whatever in the land, shall be admitted to establish boundary between one person's property and that of another. Clothier vs. Chapman, 14 East, 330, 331, note. With respect to this, however, I do not wish to be understood as advancing any decisive opinion; it may be possible, that under some peculiar circumstances, such evidence would be admissable

in case of private rights. But I have no hesitation in saying, that to admit the declarations of a deputy surveyor, or a connected draft made out by him, as evidence of the extent or boundary of a party's right to land, who never employed him to run his boundary lines, and for whom he never did such a thing, would produce the most crying injustice. For without having run or traced, in his official character, or otherwise, it you please, the boundaries of the party under the direction of the party himself, how is he to have a knowledge upon the subject that ought to be credited more than that of any other person? It would, in effect, be to make the work of a deputy surveyor, or his declarations, evidence of a person's right or of his want of right, just as it might happen, although such deputy had had never surveyed or run the lines of the person either for him or any one under whom he claimed." * * * * * * * * *

"It has in the last place been contended that this connected draft was admissible evidence upon the score of its being an official paper, found among the official papers of Samuel Lyon, the deputy surveyor, under whom, it was proved Benjamin Wallace acted in making the forty surveys for Buchannan. The case of Miller vs. Carothers, 6 Serg. and Rawle, 221, is relied on as an authority in point. The principle which seems to be established by that case as well as some others, is, that if the paper appear to be the work of the deputy surveyor's official duty, and to have been found among his official papers, it may be given in evidence. But it is not to be inferred from the fact of its being found among his official papers, that it must therefore be considered official also. An authority as deputy surveyor, to do the act of which the paper purports to be an execution, must be shown."

In Bonnett vs. Smith, 3 Binney, 175; it was held, "The declarationsof a deputy surveyor that he had made a certain survey under an order from the proprietaries, are not evidence although he was dead before the trial, and although his official papers had been accidentally burnt, and although in addition to these circumstances the warrant of acceptance recited that the survey had been made under such an order."

In Penny Pot Landing vs. Philadelphia, 4 Harris, 79; maps, ancient surveys, as well as reputation, are evidence to elucidate and ascertain a boundary, but not to impach official grants on public record, control having been long exercised in conformity to the grants.

Sample vs. Robb, 4 Harris, 319, the court said the offer to give "the talk of the neighbors" in evidence was rightfully rejected. It is the first time I have ever heard that such evidence as "it was always spoken of in the neighborhood as Lewis' land" was entitled to any weight whatever in the trial of an ejectment or was an element of title."

In McCausland vs. Fleming, 13 P. F. Smith, 38, pedigree and boundary are the excepted cases wherein reputation and hearsay of deceased persons are received as evidence. The statements of deceased persons, relative to boundaries of which they spoke from actual personal knowledge, have been frequently received as evidence in this State. Kauffman vs. Cedar Spring Congregation, 6. Binn. 62, 63; Buchannan vs. Moore, 10 S. & R., 281; Bender vs. Pitzer, 3 Casey, 335. And ancient maps and surveys are evidence to elucidate and ascertain the boundary and fix monuments. Penny Pot Landing, &c. vs. Philadelphia, 4 Harris, 91, Sample vs. Robb, Id. 339. The distinction is stated by Coulter, J. in the last case, to

be between drafts when offered for title and when offered for boundary. For the former purpose none but such as are shown to bear an official character will be received. These must be traced to the possession or office of the surveyor, or appear to have been made in an official character. Urket vs. Coryell, 5 W. & S. 79; Woods vs. Ege, 2 Watts, 336-7; Blackburn vs. Holliday, 12 S. & R. 140."

A further objection was made to the deposition of John Fisher, that it was taken in certain cases then pending in the Court of Common Pleas, of Northumberland county, between Ira T. Clement, plaintiff, and the Northumberland Coal Company, defendant. That the cases in which the deposition was taken were tried and finally disposed of while John Fisher was living and within the jurisdiction of the Court, and that this deposition was never read at any of the trials, and it was never competent evidence in any of the trials. But Fisher's evidence taken in these former trials was read in evidence *in this case*.

FOURTH SPECIFICATION OF ERROR.

In the discussion of the remaining specifications of error from the 4th to the 17th inclusive, the defendant's counsel complain that the assignments are so defectively made that it is impossible to know wherein the plaintiff in error complain of the charge of the learned court below, and of their answers to the points. These specifications do not point out where the learned court below did not state the evidence fairly and correctly. Nor is the evidence stated in the specifications or referred to in the record so as to inform the court of the matter complained of.

It is true there is some evidence and abstracts of evidence returned in the record. This trial lasted from November 19th to December 29th. An immense amount of

oral evidence was heard and this record returned is but a very small part of the evidence produced on the trial.

But the evidence, such as is returned in the record, is of no use; for the assignments do not refer to it so as to make it a part of the specifications, and hence this court will not look into it; and if this court would assume the functions of a jury, and examine the evidence they would probably reach the same results that the jury did.

In Reed vs. Gardner, 17 Wall., this court said:

"It has been frequently held by this court, that in passing upon the questions presented in a bill of exceptions it will not look beyond the bill itself.

Norris vs. Jackson, 9 Wall., 125.
Lincoln vs. Claflin, 7 Wall., 136.
Leftwich vs. Lecanu, 4 Wall., 187.
Russell vs. Ely, 2 Black, 580.

"The pleadings and the statements of the bill, the verdict and the judgment are the only matters that are properly before the court. Depositions, exhibits or certificates not contained in the bill cannot be considered by the court. The case of Flanders vs. Tweed, 9 Wall., 435, was exceptional—the court intend to adhere to this practice."

"The bill of exceptions contains no statement of the evidence, or of the facts upon which the questions arose. It consists only of the charge to the jury, and of requests and refusals to charge.

It is impossible that we should know whether the charge is correct or erroneous, or whether the refusals to charge as requested were justified or whether they were improper. As already said there is absolutely nothing presented to this court for its consideration."

In Russell vs. Ely et. al., 2 Black 575, this court said:

"It is true this court did not see anything in that part

of Baker's testimony embodied in the bill of exceptions which justified such an inference. But the bill of exceptions does not purport to give all that he said, and according to a well known rule this court under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instructions. What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us; and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is truly a useless incumbrance of the transcript, and an expense to the litigating parties. Clerks who certify transcripts to this court should know what does properly constitute the record they are to send up, as it is a matter which has been often decided and which may be readily learned with a little attention."

Also in the subjoined cases this court have held "where no part of the evidence is set out in the bill of exceptions showing the materiality of the charge complained of, the case presents only an abstract proposition of law, which this court is not required to consider."

Jones vs. Backnall, 14 Otto 554.
Dunlap vs. Monroe, 7 Cranch 270.
Worthington vs. Mason, 101 U. S. 149.

So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial; to the ruling of the law by the judge, and the admission or rejection of evidence. (1 Bac. Abr. 779; Bull N. P. 316.) Beyond this we have no power to look into the bill, on a writ of error as it is the creature of statute and restricted to the point stated, (13 Edw. 1 Ch.

31), and only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted shall be carried into the bill of exceptions. All beyond serves only to incumber and confuse the record and to perplex and embarrass both court and counsel.

Zellers lessee vs. Eckert, 4 How. 288-298.

The rule in Pennsylvania is that where the charge of the Court is excepted to, and filed of record, the facts therein stated, as admitted or proven, must be taken as true, unless the evidence brought up by the bill of exceptions contradicts the statement of facts contained in the charge.

McNair vs. McLennan, 12 Harris, 384.

"We must assume the entire correctness of whatever the learned Court below said about the evidence, which does not appear in the paper book."

Joyce vs. Lynch, 17 Weekly Notes of Cases, 79.

The fourth specification of error is to the portion of the charge, as follows: "The William Elliott is one of a block of surveys of the date of October 21st and 22nd, 1794, embracing what are now known as the LeFevre lands. They extend along the Brush Valley lands on the south, the surveys calling for those lands; the call of the William Elliott on the north is for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds.

There is no controversy as to the southern line of the William Elliott. Its south line is the north line of the tracts surveyed in the names of Sarah Lane, Jesse Evans and Jesse Brooks, which line was run and marked on the ground by the deputy surveyor on the 17th of October, 1793.

The William Elliott calling on the south for these last named surveys, and on the north for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds, rightfully embraces all the land within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley tracts called for by the William Elliott may be, to that line must it go."

The learned court in this part of their charge refers to William Elliott survey as one of a block of surveys. The William Elliott, Lewis Walker, William Shannon, Nathaniel Brown and Ebenezer Branham are five of the six warrants taken out by Doctor Ruston and although all dated on the 26th of November, 1793, the purchase money was paid by Dr. Ruston on the 14th June, 1794, as appears by the old purchase blotter and the warrants were not issued until after the purchase money was paid, see printed record, page 66. They were surveyed on the 21st and 22nd of October, 1794, and returned to the land office. The plaintiff in error claimed the Charlotte Ruston and Mary Meyers surveys, lying at the north of the William Elliott, and were two of a block of eleven surveys, made under the warrants, all dated 11th of June, 1793, in the name of Daniel Reese, Charlotte Ruston, Mary Meyers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua A. Bean and Samuel Lobdell, which eleven warrants were surveyed by William Gray, on the 2nd and 3d of October, 1793. These warrants were laid upon the ground so as to adjoin each other side by side. These eleven warrants were in the hands of the deputy at the same time the warrants were issued upon the same day and calling for each other, and located at the same time in one body. and returned into the land office same time,

come within the definition of a block of surveys, which is defined in Mathers vs. Hegarty, 1 Wright, 64, as "a series of surveys made by one surveyor upon warrants issued upon the same day, dependent upon each other in succession, calling for each other, and returned to the office at the same time, must be regarded as forming one block and be located together as a body." See also Heggarty vs. Mathers, 7 Casey, 348.

The south line of the William Elliott was the line of older surveys of October, 1793, in the name of Sarah Lane, Jesse Evans and Jesse Brooks, the north line of which tracts was found well marked upon the ground as of the date of the official return of survey, and this line was the south line of the William Elliott for which tracts the Elliott call to join on the south. The Elliott also calls on the north to join the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds surveys. The block of eleven surveys was found with their north line well marked upon the ground with the corner trees and many other line trees still standing upon the ground. That the north line was an irregular and zigzag line with four corners on many of the northern ends of the tracts the calls of the official surveys on the north line were for living corners which is also strong evidence that the deputy surveyor when he located these eleven surveys actually run their north line and marked them on the ground. The cross lines between the eleven surveys were not run upon the ground with one exception, and that is the cross line between the John Reynolds and Thomas Billington surveys. This line was run by the deputy surveyor dividing these two tracts, and was well marked upon the ground, and that fact was not disputed in this trial. The official survey of John Reynolds calls for a small maple at its southeast corner three hundred and twenty-six perches

from its northeast corner. The Thomas Billington official calls for a small maple at its southwest corner three hundred and forty-two perches from its northwest corner; the Billington and the Reynolds adjoin and call for common corner, "*a small maple.*". This same corner is also called for in the official return of the north line of the survey of the Lewis Walker, one of the junior block composed of the Elliott, Walker, Snannon, Brown and Branham, and the *small maple* therefore is not only made a common corner for the Billington and Reynolds, but a monument for the Lewis Walker, and the block of which the Walker is a member. The plaintiff in error claims that this maple corner was not at the point where the official distances from the north line of the John Reynolds and Thomas Billington would put it, but claims to extend this line sixty-one perches further south,and also to extend all the other tracts until they reach the west line of the Daniel Reese, where the extension of that line beyond the official distance was eighty-six perches. The effect of which will be to take off from the William Elliott sixty perches, and this is the land that is in controversy. The defendants in error claim that the small maple was found by David Rockefeller and several others who accompanied him in 1847, with the living witness to it, which counted to the date of the official survey at the proper distance where it is called for by the Thomas Billington three hundred and forty-two perches from its north line and at three hundred and twenty-six perches from the north line of the John Reynolds. That no marked lines have ever been found as the plaintiff below claims for any of the lines of the eleven surveys except the north line and the line between the Billington and Reynolds terminating at the maple corner. The plaintiff in error claims a chestnut oak at the south of the Lobdell and a gum line tree, and one gum witness sixty-one perches further south than the official distance, as the southwest corner of the

Billington, and the southeast corner of the Reynolds. The block composed of the Elliott, Walker, Shannon, Brown and Branham was never actually marked upon the ground, that they are nearly a year younger than the surveys north and south of them; as no marks have ever been found of the date of these surveys, and as they call for older surveys all around them, except on the west, the deputy surveyor even if he had been on the ground at the time he located these surveys in October, 1794, he would have returned them as adjoining the old surveys on the north and the south without marking anew the lines of those older surveys to correspond with the date of the junior surveys. The learned Court below directed the jury that as the William Elliott in its official return call to adjoin the Sarah Lane, Jesse Evans and Jesse Brooks for its south line, and which line was run and marked on the ground on the 17th of October, 1793, and as the Elliott calls for the Daniel Reese, Charlotte Ruston, Mary Myers and John Reynolds, as its northern boundary, that the William Elliott rightfully embrace all the land within these calls, whether or not in excess of its quantity as officially returned. Wherever the true southern line of the Brush Valley, (eleven tracts,) tracts called for by the William Elliott may be, to that line it must go.

The only material part of the charge assigned for error which calls for any discussion is that part which directs the jury to ascertain the true southern line or boundary of the eleven Brush Valley surveys, and to that line the William Elliott is entitled to go, as there were no official marks on the north of the Elliott made for it by the deputy surveyor to limit it short of its calls. Therefore, under the rules of locating lands in Pennsylvania, the Elliott was entitled to go to the older adjoining survey, which the Elliott calls to join by the official return of that survey. The

general doctrine is laid down by the Supreme Court of Pennsylvania, in Quinn vs. Hart, et. al., 7 Wright, 341.

"The result of the authorities may be stated thus: The lines run and marked on the ground are the true survey, and when they can be found will control the calls for a natural or other fixed boundary and conclusively establish the survey; but when a younger survey calls for an older as an adjoiner, and no lines are found to have been marked for the younger on the side on which the older is called for, the line of the older becomes the division line between the two tracts; or, in other words, the younger is to be laid so as to adjoin the older. If no adjoining survey and no natural monument be called for by the younger, and no lines be found on the ground, then the lines returned into the land office determine the location."

When the lines are not run and marked on the ground, and there are no other circumstances equally decisive, calls for adjoiners and other fixed boundaries invariably govern the calls for courses and distances, when there is a discrepancy between them for the reason that it is easier to be mistaken in measurement than it is in a boundary.
Brolasky vs. McLain, 11 P. F. Smith, 163.
Mackentile vs. Savoy, 17 S. & R., 104.
Murphy vs. Campbell, 4 Barr, 485; Cox vs. Couch, 8 Id. 147
Petts vs. Gaw, 3 Harris, 218; Mathers vs. Hegarty, 1 Wright, 64; Speakman vs. Forepaugh, 8 Id. 372.
Bellas vs. Cleaver, 4 Wright, 260.
Marhattan Coal Co. vs. Green, 23 P. F. Smith, 310.
Watson vs. Jones, 4 Norris, 125.

The lines of older surveys marked upon the ground and adopted by the surveyor for the younger are of the same validity as if the lines of the younger survey had been run and marked upon the ground, and such lines of the older surveys become the line and boundry of the younger.

Eister vs. Paul, 4 P. F. Smith, 198.
Parsall vs. Jones, 5 Id., 153.
Manhattan Coal Co. vs. Green, 23 P. F. Smith, 310.
Bellas vs. Cleaver, 4 Wright, 260.
McDreer vs. Caraskadden, 12 Wright, 38.
Caul vs. Spring, 2 Watts, 390.

As the block of which the William Elliott was a member contained no original work upon the ground made for it, but was so located as to adjoin older surveys on three sides, it was a valid survey; but after the lapse of twenty-one years the presumption of law is conclusive that the surveys were actually made upon the ground as returned by the deputy surveyor. In the absence of marks upon the ground therefore which would limit the William Elliott on the north it must go to its calls for the older adjoining surveys on the north.

Nieman vs. Ward, 1 W. & S., 79.
Mock vs. Astley, 13 S. & R., 382.
Caul vs. Spring, 2 Watts, 390.
Lamborn vs. Hartsvich, 13 S. & R., 113.
Bellas vs. Levan, 4 Watts, 300.
Schnable vs. Doughty, 3 Barr, 395.
Bellas vs. Cleaver, 4 Wright, 261.

These authorities and many others not cited establish the rule and is the settled law in Pennsylvania that the William Elliott having no mark of its own is entitled to go to its calls for the Brush Valley survey upon the north whether or not in excess of its quantity as officially returned. The next question in logical order is where is the true southern line of the Brush Valley block of surveys for which the William Elliott and other surveys, called the LaFevre block, call to adjoin as their northern boundary?

In the location of blocks of surveys the same rules prevails as to the preference which marked lines have over

calls for adjoiners, and calls have over the courses and distances, as in single surveys. But in the location of a number of surveys surveyed at the same time with warrants of the same date, and for the same owner, and returned into the office at the same time, it is found by experience that the interior lines of the block were seldom actually run, but were simply protracted in the office of the deputy, and often times only a portion of the exterior lines were actually run and marked on the ground. Hence we have the following rule: "A series ofsurveys made by one surveyor upon warrants issued upon the same day, dependent upon each other in succession, calling for each other, and returned to the office at the same time, must be regarded as forming one block, and be located together as a body."

Mathers vs. Hegerty, 37 Pa. St., 64.

"Where the true location of the tract of land in dispute is to be ascertained by a survey more than sixty years old, and without the aid of marks upon the ground which must, therefore, be located by its calls for other surveys—it is not error to instruct the jury, that as a rule applicable to an undisputed state of facts it cannot be severed from the body of which it was returned a part and for which it calls, when, by adhering to such body, it answers the greater number of its calls, and preserves the distances, figures and quantity, even though one of the calls must be entirely disregarded by this rule."

Mathers vs. Hegerty as above.

The learned court below directed the jury to ascertain the true southern line of the Brush Valley block, to which the William Elliott would be entitled to go.

This instruction was in accordance with the unbroken line of authorities in Pennsylvania. In Mathers vs. Hegerty, 37 Penn. St., 64, the Supreme Court held

"although the true location upon the ground of a tract of land returned surveyed, is, ordinarily, a fact for the jury, yet where there are no marks upon the ground, and there is no other evidence of an actual survey than is contained in the return, the true location must be ascertained from the situation of other tracts for which it calls and the jury are to be governed in the inquiry by legal principles. In such cases the finding becomes a deduction from rules of law rather than the simple ascertainment of the fact."

The principles of the last stated case sustain the instruction of the court below as to the location of the William Elliott, and the other members of that block, as there was no line to establish the northern boundary except the southern line of the Brush Valley block.

The proof necessary to establish a block is briefly stated by the Supreme Court of Pennsylvania, in Moch vs. Asteley, 13 S. and R. 385; in the following language: "The charge of the court excepted to in the third specification of error as to the non-production of the warrants and surveys of a block of forty-three surveys whose exterior lines are alleged to have been marked, was in order to bring the well settled doctrine that surveys of large bodies of land, of companies or individuals, though the interior lines of each tract have not been run or marked to bear on the case; for it was incumbent on the plaintiffs to prove this as a fact; that there was such block of surveys made for such companies or individuals, and that fact was to be proved by the best evidence in the parties power, and that was the warrants and surveys. It was not, as the court supposed, the question of boundary but a fact, a fact capable of proof, not by reputation or by diagram, but by giving in evidence the official documents always with in the parties power."

Again in Schnable vs. Doughty, 3 Barr, 398, the court says: "Many cases have determined that the interior lines of a body of surveys made for a company or individual need not be run on the ground. When such a case arises, as in this case, there is no safety without proving the fact by the warrants and surveys of the whole body, commencing with the leading warrant and the leading survey and following them up with the adjoiners."

Mock vs. Astley, 13 S. & R. 382: "Old lines of adjoining surveys designate and fix the location of the new survey. It is improper to remark old lines in marking a new survey; it leads to confusion."

Covert vs. Erwin, 3 S. & R. 283.

The Supreme Court of that State have established as a rule of evidence that the only way to prove a block of surveys is by the production of the warrant and surveys embraced in the block. It is obvious that the acts and declarations of the deputy surveyor after his official connection with the surveys had entirely ceased cannot be evidence for any purpose to effect the rights of the owner and much less for the purpose of supplying that fact which can only be proved by the official records of the land office.

The purpose was to prove that eleven surveys, beginning with Daniel Reese on the west, and Samuel Lobdell on the east, upon warrants issued 11th June, 1793, upon which surveys were made according to the return on the 2nd and 3rd days of October, 1793, constituted a block with the Richard Martin survey, located immediately east and adjoining the Samuel Lobdell. The Richard Martin could not be a part of the block with the eleven surveys referred to in the offer, because the Richard Martin warrant was not issued until the 22nd day of January, 1794, several months after the surveys upon the eleven warrants

had actually been made upon the ground. The survey upon the Richard Martin warrant was made on the 23rd day of February, 1794. The survey was not returned into the land office at the same time the returns of the eleven were made. The Martin was returned into the land office on the 28th of February, 1794, three days before the return of the eleven surveys was made to the land office. The record evidence, therefore, shows that the Richard Martin was not a part of the block with the eleven surveys, known as the Brush Valley block. The record shows that it did not meet one single requirement necessary to make it a part of the Brush Valley block. The official papers in evidence, which were conclusive upon all parties concerned in this case, established the fact that the Richard Martin was a junior survey, and as such could not either enlarge or contract the dimensions of the older survey.

Bellas vs. Cleaver, 4 Wright, 260.
Carbon Run Improvement Co. vs. Rockefeller, 1 Casey, 49.
Manhattan Coal Co. vs. Green, 23 P. F. Smith, 310.

It therefore became the duty of the jury to ascertain the true southern line of the Brush Valley block, and the instruction of the learned court to that effect was proper and the evidence in the cause was properly submitted to the jury on this subject. In the Manhattan Coal Co. vs. Green, 23 P. F. Smith, 310; the Supreme Court of Pennsylvania held:

1. "A younger block of surveys call for older blocks on the north and on the south; there not being sufficient vacancy to answer the calls of all, the younger must give way."

2. "No mistake in the calls of the younger survey could effect the location of the older, it could not be changed by the calls of the younger."

3. "To locate the younger the proper way was to *run out the older block.* The first surveys of the younger would be entitled to the vacant land."

In Quinn vs. Heart, 7 Wright, 337, "It was held where a younger survey calls for an older as an adjoiner, and no lines are found marked for the younger on the side on which the older is called for, the line of the older becomes the division line between the tract, therefore in a case where a younger survey call for an older and no division line was found to have been marked on the ground for the younger when it was surveyed, it was not error in the court to permit a jury to locate the younger survey according to its calls instead of its official lines, and for this purpose it was the duty of the jury to ascertain the lines of the older, for which the younger calls. For the marks of the older are the marks of the younger, which call for it. The instructions given to deputy surveyors required them to adopt old lines for new surveys, where they were meant to adjoin, instead of marking new lines, and the policy of both the proprietaries, and the commonwealth has always been to lay warrants adjoining each other where it was possible, instead of leaving long narrow strips of vacant land between them which would be slow in finding purchasers. When, therefore, we speak of marks on the ground determining the location of a particular survey, we have reference not only to what the axeman did when that survey was made, but also to what was done when the older warrants call for as an adjoiner was located."

In Bellas vs. Cleaver, 4, Wright, 260, it was held "where the line of the older survey, called for by younger surveys, was not actually run on the ground and located upon the line marked for them, but, as the adjoining lands were unappropriated at the date of the older survey, was supposed

to be chamber work, the call for it as an adjoiner in the younger surveys has no effect either to enlarge or contract the dimensions of the older survey. The question is one of fact for the jury, as to what was the actual location of the older survey on the ground at the time it was made."

See also Darrah vs. Bryant, 6, P. F. Smith 69.
Malone vs. Salada, 12 Wright 419.

As before stated the northern line of the Brush Valley block of surveys was well marked upon the ground and that line was established, beyond any question, by all the surveyors called in the case ; and also equally well established that the division line between the Billington and the Reynolds had been run and marked as far south as the official distances called for by these tracts, and to the small maple corner called for at the south as the common corner for the Billington and Reynolds at the proper official distance was claimed to be the true corner by the defendant in error. The plaintift in error claimed an extension of this line sixty-one perches further south where he claims to have found maple sprouts and the gums as aforesaid, and he claims this point as the common corner of the Billington and Reynolds, but there was no evidence of any marked line along this 61 perches corresponding to the date of the official survey between the Rockefeller corner and the plaintiff in error's corner 61 perches further south. The defendant in error claims that the true mode of location of the Brush Valley block was to begin at the northern line which was well established, and to run out the several surveys according to their official courses and distances, which would establish the southern line at the Rockefeller corner between the Billington and Reynolds.

In Pruner vs. Brisben, 2 Out. 202, it was held "where several tracts of land have been surveyed in a block and returned to the land office, the lines and corners marked

upon the ground in any part of the block are to be considered as belonging to each and every tract of which said block is composed. If sufficient lines and corners thus marked can be found, they determine the location of the whole block and of every tract in it without regard to the calls for adjoiners or for waters, if such calls conflict with the lines actually run upon the ground and returned."

In conclusion, therefore, of this branch of the argument the learned court below properly instructed the jury that in locating the two blocks they were first to ascertain where the true southern boundary of the Brush Valley block was, and after having ascertained that the William Elliott was entitled to go to that south line wherever the jury found that south line to be. That the whole question of fact was submitted to the jury for them to determine, and after they had determined the location of the south line the Elliott was entitled to go to it, as there was no marks made upon the ground for the Elliott survey to limit it from going to its call on the north. The fact that it should go to its calls for the Brush Valley lands was a deduction from the rules of law rather than the simple ascertainment of a fact.

FIFTH SPECIFICATION OF ERROR.

The fifth specification of error involves neither a legal proposition nor any instruction to the jury upon the facts of the case. The learned Court below in this part of their charge simply states to the jury the theories of the parties as to the proper mode of ascertaining the true location of the Brush Valley surveys. The defendant in error and the plaintiff below claimed that the true mode of locating the Brush Valley surveys, was to start from the northern line, which was well marked and conceded by all the

evidence in the case, to be their northern boundary, and to lay off the several tracts southward according to their courses and distances, according to the return of the official surveys, which would make the southern line correspond with the Rockefeller maple corner at the south of the Billington and Reynolds, and this view of the location would make the land in dispute a part of the William Elliott survey. The plaintiff in error claimed that the true mode of ascertaining the location was to start at the "*post by the pine*," the southeast corner of the Richard Martin survey, running westward the courses and distances of that survey to the Samuel Lobdell, the eastern-most survey of the Brush Valley block. The line so run would be thirty-two perches south of the southeast corner of the Samuel Lobdell, and thence they proposed to continue that line westward according to the courses and distances of the officials of the Brush Valley surveys, and at the point of the dividing line between the Billington and Reynolds, this line would be sixty-one perches further south than the official distances called for in the Billington and Reynolds, and this line extended westward to the western line of the Daniel Reese, where the line thus extended would be eighty-six rods further south than the western line of the Daniel Reese official distance. Following the theories of the plaintiff in error, the land in controversy would fall within the lines of the Mary Myers and Charlotte Ruston, thus extended. It was this claim upon the part of the plaintiff in error to extend their lines beyond the official returns of survey, the Court referred to, when they told the jury that the location upon which the defendant insists, involves a wide departure from the official returns of survey, and this was most manifest, because it distorted every figure of the block. The Court's charge, as a whole, was a very fair, concise and impartial submission of the question of location of the several blocks and

tracts in controversy, and the whole question was left to the jury to determine. There was no binding direction upon any question involving the location, which as a question of fact, the jury had a right to determine.

SIXTH SPECIFICATION OF ERROR.

The sixth specification of error relates to the instructions of the court to the jury in reference to certain blocks which had been taken from certain trees by the plaintiff in error in what was claimed by him to be the southern boundary of the Brush Valley block. One of the blocks was taken from a chestnut oak one hundred and forty rods westwardly from the southwest corner of the Samuel Lobdell survey. The other was a block taken from a gum tree, which was claimed by the plaintiff in error to be a witness to the corner between John Reynolds and Thomas Billington surveys. These blocks were shown by the evidence to be in the possession of the plaintiff in error and under his control. The chestnut oak block had been used as an exhibit on a former trial involving the title to this land. It had been examined by a number of expert surveyors and the fact whether it was an axe mark was controverted, and the age of the block was also controverted. In the case of the gum block, witnesses that examined the trees from which it purported to have been taken before the block was taken from the tree, testified that there were no indications of an axe mark on it. The trunk of the tree from which this block was taken was exhibited to the jury upon the trial of this case, proof was made by a large number of expert surveyors that the block, which purported to have been taken from it, showed that there was no axe marks in the tree, and that it was impossible to separate the growths so as to count any block taken from the tree. Both of these blocks were

shown by the evidence in this trial to have been in the possession of the plaintiff in error at the very time the suit was being tried. In view of these facts it is complained that the court below committed error in holding that the gum block, in view of the essential aid it might afford the jury in determining a decisive fact in the case, justly subjected the defendant to a presumption unfavorable to his hypothesis, in respect to the character and age of the mark on that tree. In speaking of the chestnut oak block the learned Judge said to the jury, "here there is a direct conflict between the expert witnesses who have examined the block from the chestnut oak, and the greater number testified that the count fell short of the survey of 1793 by four years. The block itself which in connection with expert testimony might have aided you essentially as well as in correctly determining whether it bore an ancient axe mark at all, (which is seriously disputed) as in solving the controverted question of age, has not been produced by the defendant nor its absence accounted for. The evidence traces the block into the defendant's possession. It was used by him as an exhibit at the Lock Haven trial, and it was then called into question as it is here. Why is it now absent, when it so vitally affects the case?" The presumption to which a party subjects himself by withholding material and essential evidence in the trial of a cause is clearly stated in the elementary works, and fully supported by the adjudicated cases. The presumption of innocence may be overthrown and a presumption of guilt be raised by the misconduct of the party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled. Thus the spoilation of papers material to show the neutral character of a vessel furnishes a strong presumption "in *odium spoliatoris*" against the ships neutrality. Thus if some of a series of documents of title are suppressed by

the party admitting them to be in his possession, this evidence that the documents withheld, afford inferences unfavorable to the title of the party. Where the finder of a lost jewel would not produce it, it was presumed against him that it was of the highest value of its kind.

1 Greenleaf Ev. Redfield's Ed. 42.

If the devisee in a first will, destroy a second, it is ground for presuming that the later contained revocation of his devise in the first. The mere nonproduction of written evidence, which is in the power of the party, generally operates as a strong presumption against him, and it may be remarked generally that in a trial, either in criminal or civil cases, the omitting to produce evidence in elucidation, which is in the power of the party, or within his peculiar knowledge shall be holden to turn every doubt against him.

1 Phillips Ev. McCowan & Hill's notes, 4th Am. Ed. 602.

1 Starkey Ev., 52.

Williams vs. Comth., to the use of the Fidelity Trust and Safe Deposit Co., 37 Leg. Int. p. 85, Supreme Court of Pennsylvania held that where a party has a witness whom he could call and does not, the legal presumption is that his testimony would be unfavorable to that party.

McReynolds vs. McCord, 6 Watts, 288.

Hubert vs. Bordin, and another, 6 Whar., 79.

An absolute refusal of a party to disclose the facts in his answer, when directly called upon to do so, although the law does not compel him to be more specific, raises presumptions against him.

Crosby vs. Buchannan, 23 Wall., 420.

Evasive answers in patent cases afford stromg presumptive evidence against the respondent.

Agawan Woollen Co. vs. Jordan, 7 Wall., 583.

Maps, surveys and other drawings are not to be distinguished from other papers in this respect, they are the best evidence of what they contain. A party who withholds them, when he ought to produce them, and attempts to supply their place by secondary evidence, is liable to the same presumption against him as trying to suppress the truth, as he would subject himself to by withholding paper writings. They can be brought into court as easily, an accurate knowledge of them by the jury is as necessary to the purposes of justice, and the probability that a witness who undertakes to describe them from memory will fail to do it correctly, is much greater. To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact must take the consequences of any honest indignation which his conduct may excite. The presumption in odium spoliatoris is perfectly legitimate. It is so natural and so just that it is a part of every civilized code.

Bryant vs. Stilwell, 12 Harris, 314.

SEVENTH TO SEVENTEENTH SPECIFICATIONS OF ERROR.

The remaining specifications from the seventh to the seventeenth, inclusive, relate to the subject of location and therefore may be discussed together. This ejectment was for a tract of land, "Beginning at a post 319 perches southward from the northwest corner of a survey, in the name of Mary Myers, dated October 2nd, 1793, being the southwest corner of the said Mary Myers' tract; thence extending south 86 degrees, east 240 perches, more or less, to a post, the southeast corner of the said Mary Myers' tract; thence south 4 degrees, west 60 perches to a corner; thence north 86 degrees, west 240 perches, more or

less, to a stone; thence south 4 degrees, west 33 perches to a stone; thence north 86 degrees, west about 14 perches to the eastern line of the Thos. Reese, Jr.; thence north 61 degrees, west 120 perches to the southern line of the Charlotte Ruston tract, located at the official distance from its northern lines; thence along said south line of the Charlotte Ruston tract, south 86 degrees, east 140 perches to the southeast corner of the Charlotte Ruston tract, and thence north 4 degrees, east 32.9 perches to the beginning, containing 120 acres, more or less."

As this tract of land purported to be a part of the William Elliott, immediately south of, and adjoining the Charlotte Ruston and Mary Myers' surveys, it became important to ascertain the true southern boundary of the block of surveys of which the Charlotte Ruston and Mary Myers were two, known as the Brush Valley block. It became of equal importance to ascertain that boundary for the purpose of ascertaining the northern boundary of the William Elliott, which had for its northern line the southern boundary of Daniel Reese, Charlotte Ruston, Mary Myers, and a portion of the John Reynolds. The defendant in the court below claimed that the southern boundary of the Mary Myers was more than sixty rods south of the lines as officially returned in the land office by the deputy surveyor, and if so the land sued for would be within the lines of the Mary Myers and Charlotte Ruston. The plaintiff below contended that the southern boundary of the Brush Valley block of surveys was never marked upon the ground, and that the only division line between any of the tracts in that survey was the line marked upon the ground between John Reynolds and Thomas Billington, which terminated at a *small maple* corner as proved by the testimony of David Rockefeller, and other surveyors and persons who accompanied him in his survey made in 1847 of the Brush Valley land,

t hat that maple was the only mark that indicated the southern boundary of this block of surveys, and that by running the official courses and distances from the maple west according to the official return of the surveys was the proper mode of ascertaining the southern boundary of the John Reynolds, Mary Myer, Charlotte Ruston, and Daniel Reese, and that this mode of locating the Brush Valley block left the lands in controversy within the lines of the William Elliott survey, title to which the plaintiff in the court below had shown.

The Brush Valley block consisted of eleven surveys, surveyed upon the 2nd and 3rd days of October, 1793, upon warrants dated the 11th day of June, 1793. These surveys were laid upon the ground in the following order: Daniel Reese, Charlotte Ruston, Mary Myer, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean and Samuel Lobdell. These eleven surveys constituted what is known in Pennsylvania as a block. The northern boundary commencing at the chestnut oak the northwest corner of the Daniel Reese was well marked upon the ground the whole length of the eleven surveys, many of the corners called for in the return of survey were still standing at the places called for in the official return, at the time this case was tried. The entire length of this line being several miles long very nearly corresponded with the distances as returned by the deputy surveyor. The line between the John Reynolds and Thomas Billington, the only dividing line between the eleven surveys that called for a living corner upon the southern end, was well marked upon the ground to the maple corner, as proved by David Rockefeller and others, and very nearly corresponded with the official return of survey. There was no controversy about the originality of

the northern line of the Brush Valley block and the dividing line between the Billington and Reynolds for the length of the official distances of those two tracts in this trial. The line upon the southern side of the William Elliott, Lewis Walker, Nathaniel Brown and William Shannon was an original line well marked upon the ground and made for surveys located to the south of them in the name of Sarah Lane, Jesse Evans and Jesse Brooks. This line was made on the 17th October, 1793. The dividing line between the Brush Valley block, and the William Elliott, Lewis Walker and Nathaniel Brown was not run upon the ground, at least marks have not been found to indicate such dividing line, although for about seven or eight miles the line runs through an original forest. The William Elliot calls for the Daniel Reese, the Charlotte Ruston, Mary Myer, and part of the John Reynolds on the north, the official courses and distances of its northern line correspond with the official courses and distances on the southern boundary of the surveys for which it calls, and has offsets in its northern boundary, which correspond with the like offsets in the southern boundary of the surveys for which it calls. The same is true of the Lewis Walker and the Nathaniel Brown, they likewise call for the several surveys adjoining them upon the north and have offsets to correspond with the like offsets in the southern line of the Brush Valley block, and the Lewis Walker calls for a small maple in its northern line, which corresponds with the maple at the end of the division line between John Reynolds and Thomas Billington.

The courts of Pennsylvania have established certain legal rules, by which the location of single surveys and a block of surveys are to be determined. These are rules of property and not rules of evidence. The lines actually

marked upon the ground constitute the survey, whether the warrants call for an adjoiner or otherwise.

Howell vs. Tanner, 4 Pa. St. 244.
Thompson vs. McFarland, 6 Pa. St. 478.
Thomas vs. Mauer, 15 Pa. St. 129.

The lines marked on the ground control the return of the surveyor even where that calls for a natural or a fixed boundary.

Walker vs. Smith, 2 Pa. St. 432.
Burkholder vs. Markley, 2 Out. 40.
Manhattan Coal Co. vs. Green, 23 P. F. Smith 310.

Thus when the lines actually run and marked upon the ground by the deputy surveyor in making the location of a survey or surveys can be found upon the ground corresponding in age with the time the survey was actually made such line constitute the survey. They control the courses as well as the distances, actually returned. Where the lines are actually found marked upon the ground there is seldom any difficulty in determining the actual location of the survey, but the deputy surveyors frequently neglected the performances of their duty, and made no marks at all on one, two or more of the lines of a survey. They frequently made but a single line upon the ground and protracted all the other lines upon paper and returned them into the land office. To meet such questions the courts of Pennsylvania established as a rule that it is sufficient evidence of an actual survey that any part of it was made on the ground; if a return call for the line of an adjoining survey it is not necessary to show that such survey was returned.

Lambert vs. Hartwick, 13 S. & R. 113.
Quinn vs. Brady, 8 W. & S. 139.
Eister vs. Paul, 54 Pa. St. 196.

Courses and distances constitute the survey where no lines are found on the ground except in case of calls for adjoiners.

Boynton vs. Urium, 55 Pa. S. 142.

A call for adjoiners will overrule the lines returned by courses and distances where there are no lines upon the ground.

Cadwell vs. Hollow, 40 Pa. St. 160.
Darrah vs. Bryant, 56 Pa. St. 69.

If the lines be not actually run and marked upon the ground the survey is to be carried to its calls for adjoiners even though it overrun the distances returned.

Younkin vs. Cowan, 34 Pa. St. 198.

It will thus be seen that where the deputy surveyor has made no marks, which can be traced upon the ground to close the survey in the absence of calls for adjoiners, the law requires the survey to be located according to the official returns of the deputy surveyor.

The same rule as to the location of surveys which has been stated, applies as forcibly to a block of surveys, as to a single survey. See the authorities governing the location of a block referred to in considering the fourth assignment of error.

From the lapse of twenty-one years after the return of survey into the land office, there arises a conclusive presumption of law that it was regularly made upon the ground as returned.

Ormsby vs. Ihmson, 10 Casey, 462.

Where a return of survey is made and accepted without a *caveat*, *a primae facie*, presumption arises that the survey was actually made upon the ground, but for twenty-one years after the return such presumption is capable of being rebutted by proof that the survey was but a cham-

ber survey. After the lapse, however, of twenty-one years, the presumption that the survey was properly made upon the ground becomes fixed and absolute, and cannot be rebutted by the evidence of any fact, however obvious.

Packer and others vs. Schrader Mining and Manufacturing Company, 97 Pa. State, 379.

The latter case cited, is probably the last utterance of the Supreme Court upon the subject, and definitely establishes the rule contended for. This conclusive presumption is not rebutted by evidence that no marks are to be found where the official return would indicate that marks were made. The defendant below in attempting to extend the southern boundary of his survey beyond the distances in the official return of survey of the Brush Valley block, had to encounter this presumption, and to overcome its conclusive effect. About ninety years had elapsed at the time of the trial after the Brush Valley block of surveys had been returned to the land office, and the court might very properly have instructed the jury that the law conclusively presumes that William Gray ran and marked every line upon every survey in the Brush Valley block, according to the courses and distances shown in the return of those surveys. According therefore to the established rules for the location of surveys there was but one legal mode of ascertaining and fixing the location of the surveys composing the Brush Valley block, that was to commence with each survey at its known and admitted corners on the northern boundary and to run them out according to the courses and distances returned by the deputy surveyor. The defendant in the court below sought to avoid the effect of the rules established by the courts for the location of surveys in cases of this kind by giving in evidence a warrant and survey in the name of Richard Martin, located immediately east of, and adjoining the

Samuel Lobdell, and by giving evidence of two or three marks on the southern side of the Brush Valley block which were claimed by him to have been made for that block of surveys. The Richard Martin is a junior survey, the warrant was issued on the 22nd of January, 1794, some months after the survey of the Brush Valley block had been actually made. The survey of the Richard Martin was made on the 23rd day of February, 1794. The survey was returned on the 28th of February, 1794, three days before the return of the surveys of the Brush Valley block. The Richard Martin calls on the east for the Francis West survey of September 10th, 1793, and these two surveys have a common south corner, "*a post by a pine*," but in order to reach that corner it was necessary to extend the eastern line of the Richard Martin, southwardly thirty-two rods beyond its official length to overcome a mistake. The official length of that line is two hundred and fifty rods. The actual length is two hundred and eighty-two rods. The south line of the Richard Martin, running from the "post by the pine," is north eighty nine and three-quarters degrees west three hundred and eight perches to a post. There is evidence tending to show that for the distance of one hundred and fifty perches from the "post by the pine," that line is marked on the ground as of the date of the Martin survey, but beyond that point no marks on that line have been found. The Richard Martin calls for the Samuel Lobdell on the west, and its official west line is three hundred and twenty rods long, the same as the Lobdell's east line.

Now, the defendant's surveyors claim that, even in the absence of proof of a marked southern line upon the Brush Valley block, the proper course in locating that block is to begin at the "post by the pine" at the southeast corner of

the Richard Martin, a monument standing altogether outside of the lines of the Brush Valley surveys, nearly a mile eastwardly of the Samuel Lobdell, and thirty-two rods further south than the deputy surveyor thought it was, as is manifest from his mistake just adverted to. Making this their starting point, the defendant's surveyors so run the southern line of the Richard Martin as to place its southwest corner thirty-two rods south of the southeast corner of the Samuel Lobdell, as defined by William Gray's official return; and they insist that the Lobdell corner shall be brought down from its position as fixed by the official return to the point they fix for the corner of the Richard Martin. They would thus extend the whole Lobdell tract about thirty-two rods further south than its official return locates it, and continuing the like process westwardly they would carry the whole southern line of the Brush Valley block, and extend every survey thereof south of the official distances as returned by the deputy surveyor, so that when the west line of the Daniel Reese is reached, the extension southwardly beyond the official distance would be eighty-six rods. The Samuel Lobdell, of course, does not call for the Richard Martin, but for vacant land, and the surveys of the Brush Valley block call for vacant land on the south and east. It will thus be seen that there is not a single call on the south and east of the Brush Valley block to extend its boundaries one inch beyond the official return of survey. The method of location proposed by the defendant in the Court below would subject the older survey to the calls of a junior survey, and would thereby violate the established rules in respect to the location of such surveys. While the Richard Martin was properly received in evidence as the official act of a public officer done in the vicinity of, and about the time that he had located the Brush Valley lands, it could not control or enlarge the

dimensions of the Samuel Lobdell for which it calls, and the other members of the Brush Valley surveys. While the Court stated that it could not assent to the method of locating the Brush Valley block claimed by the defendant below, full effect was given by the Court to all the evidence that had been submitted by the parties which had any bearing immediately or remotely upon the question of location, and the jury found as a matter of fact, that the marks contended for by the defendant were not made for the Brush Valley block, and that in point of fact, no line had been run for the southern boundary of that block. The learned Court was clearly right in charging the jury, that the Richard Martin being a junior survey, could not enlarge the dimensions of the Samuel Lobdell and other members of the Brush Valley block, which were earlier surveyed.

In the Manhattan Coal Co. vs. Green, 73rd Pa. St., 310; it was held that a younger block of surveys calls for older blocks on the north and on the south, there not being sufficient vacancy to answer the calls of all, the younger must give way.

"No mistake in the calls of the younger survey could effect the location of the older. The older block could not be changed by the calls of the younger. To locate the younger the proper way was to run out the older block. The first surveys of the younger would be entitled to the vacant land."

And in the Carbon Run Improvement Co. vs. William M. Rockefeller; 1 Casey 49, it was held "that an older survey cannot be changed, contracted or enlarged by the adjustment of the lines of a junior survey. Whether a line was actually run on the ground or left by the surveyor as an open line, it is a question of fact for the jury and their finding will not be reviewed in this court"

And in Bellas vs. Cleaver, 4 Wright, 260; it was held "where the line of the older survey was called for by the younger surveys, was not actually run on the ground and located upon the line marked for them, but as the adjoining lands were unappropriated at the date of the older survey, was supposed to be chamber work, the call for it as an adjoiner in the younger surveys has no effect either to enlarge or contract the dimensions of the older survey. The question is one of fact for the jury, as to what was the actual location of the older survey on the ground at the time it was made. * * * That after the return nothing but an order of re-survey could enlarge or diminish it, and that no act of the deputy surveyor thereafter in locating other warrants for other parties, could have this effect."

In Pruner vs. Brisbin and others, 98th Pa. St. R., 202, the Supreme Court said, "*in affirming defendant's sixth point, the jury was properly instructed that the block of 1793, as returned to the land office must be located by its own marks and not by calls of later surveys, or by marks found upon the ground younger than 1793. That the location of the Drinkers, Barton and other surveys of 1794 could have no weight in determining the location of the block in question. The instruction thus given is clearly right and not in conflict with the principle recognized in Kennedy vs. Lubold, 7 Norris 246, and other cases cited by the plaintiff.*"

In the early history of Pennsylvania our courts treated the returns of surveys as evidence, but not conclusive of what the deputy did upon the ground, and hence conflicts constantly arose between adjoining and conflicting owners, and the adjustment of such controversies and the location of such surveys was treated as a matter of fact. In the early history of our land titles, when the deputies and their assistants were living and could be called into court, and when the marks upon the ground were of recent

date and could be readily discovered there was little difficulty in determining what the surveyors did upon the ground and ascertaining the true location as made by the deputy surveyor. But as time wore on and death has removed the surveyor and his assistants, and time, tempest, fire and the destructive hand of man obliterated the monuments upon the ground it became more difficult to prove boundaries and establish titles. And in Pennsylvania the old elementary rule of law that the lapse of time strengthened a title, was likely to be abrogated, because the older the title was the more difficult it became to establish it, because the evidence to establish the location and boundary upon the ground so ancient must necessarily have ceased in a large measure to exist. Hence the necessity of relying upon the official return, as the best evidence of what the deputy did in locating the survey. As time and tempest tended to destroy the evidence of the actual work done upon the ground by the deputy surveyor the court was obliged to resort to the doctrine of presumption. And the rule now is firmly established as the law of Pennsylvania that after a survey has been returned into the land office for a period of twenty-one years unchallenged by any adverse claimants in the mode required by law, it is conclusive evidence that the survey was actually made and marked upon the ground, as shown by the official return. There had grown up in Pennsylvania a principle of evidence that where a younger survey had been located by the same surveyor who had located an older and adjoining survey, that the call of the younger was some evidence of the line of the older survey called for in the younger. This rule was not an ancient one, and it originally took the form as evidence in the case of Bellas vs. Cleaver, 4 Wright 268. In that case in discussing the rule it is stated as follows: "On the authority of Sweigert vs. Richards, 8 Barr

436, these junior surveys of the Adams and Gray warrants were received as the declarations of a deceased artist, who located the Green tract and who it was claimed had afterwards located them; this was on the principle of hearsay evidence in regard to boundary. They were, perhaps, evidence in this aspect of the case, but it was going very far to say they were "powerful evidence," as the learned judge thought that the Green lines had been actually run just where they were found. * * * * * * The only use and effect to be given to these returns on the trial was given in submitting them as hearsay evidence of boundary. As calls they have no effect to enlarge the boundaries of an older survey and to this point is the Carbon Iron Co. vs. Rockefeller, 1 Casey 55. The adjustment of the lines of a younger survey, said Woodward, J., can never effect the location of an older; it lies where it is put by the surveyor, and whilst it may help to locate surrounding surveys that are younger, it (the older) is not to be changed, contracted or enlarged by what may be *done in the location of them.* This is the true doctrine of this case, and we might well leave the discussion here, but we may notice the practical workings of a different rule. It would have the effect to change and enlarge surveys even after, as in this case, a patent had issued. It would introduce lines neither returned by the deputy surveyor nor to be found in the patent. It would pass lands not sold by the Commonwealth, and without her consent, and without paying to her the purchase money. It would ignore the orderly mode of changing a boundary by an order of re-survey, a consequence of which is payment for any increase of land and an official return of the new survey. On the other hand, as the enlargement by this process is without the consent of the senior warrant holder, it might give him quantities and qualities of land, which he did not want, and worst of all, render uncertain

the lines in his patent and the description in deeds of conveyance that may have been made from it. Gores will exist wherever vacant land lies between the marked lines of approximating surveys; and we do not advance a step to prevent this by unhinging the settled law, which presumes the location to have been made as returned after twenty-one years thus establishing the boundaries."

This admitted principal of evidence that the call of the younger was some evidence upon the subject of boundaries upon the location of the older, when both were located by the same deputy surveyor, never did have much weight in our courts, but what little weight it did have was simply mischeivous, because it led to controversies supported by different theories of surveyors, and our courts in the progress of the law made another step in advance in the doctrine of presumptions.

In Pruner vs. Brisbin et al., 2 Norris, 203, the attempt was made, as was done in the present case, to avoid the conclusiveness of the official return of survey, by the calls of a junior survey and to locate the older surveys by such junior calls. As nearly the whole of the public lands of the Commonwealth were granted away during the last century, and only small gores and pieces of land overlooked by the surveyors remain in the Commonwealth and after time and tempest had obliterated the monuments upon the ground the necessity for regarding the official return in the absence of marks as conclusive, lead the Supreme Court of Pennsylvania to the final step taken in Pruner vs. Brisbin, in which they declared ("The location of a survey duly returned to the land office must be determined by its own marks on the ground, not by marks found upon the ground, which were made prior to such survey, or by the calls of subsequent surveys.") This is a total overthrow of the plaintiff in error's claim

that the Richard Martin calling for the Samuel Lobdell could in any way control the line of the Lobdell or be evidence to ascertain the location of the Lobdell. Hence the learned court below when they told the jury that the call of the Martin being a junior survey for the Lobdell on the west could be taken into consideration in determining the lines of the Lobdell went further in favor of the plaintiff in error's theories than they were authorized to do by the decision of the Supreme Court of Pennsylvania on that very question in Pruner vs. Brisbin.

At this point we desire to call the attention of the court to two adjudicated cases, involving parts of the same land in controversy here, and where the mode of ascertaining the true boundary between these two blocks of surveys was to some extent discussed. The case of Clement vs. The Northumberland Coal Co., 6 Norris 291, the question arose in this case to the answer of the court to the third point put by the plaintiff, Clement, and asked the court to charge "that in making a location either of a single survey or a block of surveys the marks found upon the ground belonging to the junior surveys made about the same time, by the same surveyor, may be taken into consideration by the jury, as evidence of the proper location of the elder surveys, if it appears that the surveyor, in locating and marking the lines of the junior survey or surveys adopted the lines of the older surveys, which they adjoin, and returned those of the junior as identical with those of the older," which the court, Elwell, P. J., answered as follows: "Marks found upon adjoining surveys made about the time of the survey are evidence upon the subject of location, but they cannot control, or enlarge the dimensions of an earlier survey, even though they may adopt its lines.

The learned court below in charging the jury (see page

21 Printed Record) substantially followed the doctrines approved by the Supreme Court of Pennsylvania in the case of Clement vs. Northumberland Coal Co. in respect to the importance which should be given to marks found upon a younger survey upon the location of older surveys called for by the younger, in the following language: "The Richard Martin being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdell and the other members of the Brush Valley block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin; hence what the deputy surveyor did in locating the Richard Martin has been admitted in evidence and may be considered by the jury in connection with all the other evidence in the determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyor in 1793 to define the southern line of the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the norther line, according to the official courses and distances (unless indeed the jury should find in favor of David Rockefeller's location of the maple corner.)"

It will be thus seen that the learned Court gave more importance to the marks upon the younger survey than were attached to them in the case referred to. On the trial of the present case the defendant in the Court below gave evidence of a chestnut oak and two gums upon the southern side of the Brush Valley block, which they claimed were marked for the southern line of that block in 1793. To strengthen the evidence of the originality of

those marks, and to establish the fact that they defined the southern boundary of that block, the Court instructed the jury that they might consider the marks upon the younger survey to assist them in determining whether the oak and the gums were marked for the southern line of the Brush Valley block, but if with the corroborating evidence of the marks of the younger survey, the jury found that these marks on the southern side of the block of surveys, were not made for those surveys, then the Richard Martin could have no weight in determining the location of the Brush Valley block.

This view of the law is in exact conformity with the later rulings of the Supreme Court, of Pennsylvania, in the case of Pruner vs. Brisbin, previously referred to in which the Court say: "In affirming defendant's sixth point the jury was properly instructed that the block of 1793, as returned to the land office must be located by its own marks, and not by calls of later surveys or marks found upon the ground younger than 1793. That the location of the Drinkers, Barton and other surveys of 1794, could have no weight in determining the location of the block in question. The instruction thus given is clearly right, and not in conflict with the principle recognized in Kennedy vs. Lubold, 7 Norris, 246."

On the 92d page of the plaintiff's brief he says: "It must be recollected that the Brush Valley and the Richard Martin warrants were in the hands of the deputy surveyor at the time." This is not true if it is intended to refer to any work done on the ground for the Brush Valley surveys. The surveys on this block were made in October, 1793, and the Richard Martin warrant was not issued from the land office until 22nd of February, 1794. When therefore the Brush Valley surveys were made upon the ground the Richard Martin was unborn. Concede that a

deputy surveyor has the right to alter his survey while the warrant remains in his hands. It proves no fact in this case. There is not the slightest evidence that any line or lines of the Brush Valley surveys were changed after the same were made in October, 1793. The certified return of the deputy that he surveyed the lines of that block on the 2nd and 3rd days of October, 1793, are conclusive that no change was made in the original location. The work on the ground corroborated the returns. For if the lines of the Brush Valley block had been re-marked, extended or contracted after the 22nd of January, 1794, some evidence of the change would be found to indicate it.

The Northumberland Coal Co., vs. Clement, 14 Norris, 126, has been referred to by the plaintiff in error. This case involved some of the questions which entered into the controversy in this case, and it is claimed by the defendant in error to be in perfect harmony with the rulings in this case. There are some errors of fact in that case which detract very much from it as an authority.

On the 130 page of the book it appears that the testimony of John Fisher was offered to prove among other things the noted declaration of Henry Donnell made in 1814; that a stone and post corner which he then found was where he had located that corner for the southwest corner of the Thomas Billington some twenty or twenty-one years ago. This evidence was objected to by the defendant and rejected by the court upon the ground that as there was no evidence to show that Henry Donnell made the original surveys, his declarations 21 years after the surveys were made, are not admissible; Strange as it may seem, On the 138 page of the opinion of the court it is stated that the original surveys of all these tracts were made by Henry Donnell acting as deputy surveyor, as a fact in the case, Henry Donnell was never a deputy surveyor

until 1814, and the official surveys are returned by William Gray the deputy surveyor, as having been made by him. Ninety years ought to be quite sufficient to make his official return conclusive of the fact.

In Strimpfler vs. Roberts, 6 Harris 299. The Supreme Court of Pennsylvania says: "A survey unimpeached for twenty-one years is conclusively presumed to have been regular (2 Watts, 390; 1 W. & Ser. 68); and that even when there is an unexecuted order of re-survey of the board of property, (7 Barr, 67). In short, the courts of this state seem uniformly (and especially of late) to have refused to go back more than twenty-one years to settle any difficulty about the issuing of warrants or patents, or the making or returning of surveys, or the payment of purchase money to the commonwealth. These questions, like others, are disposed of according to the legal presumptions which arise from the lapse of time. The time which raises a presumption, which will act on an interest in land is twenty one years, (4 W. & Ser. 297) and this presumption unrepelled will defeat any claim that is set up against it."

The two former cases cited Clement vs. The Coal Co., 6 Norris and The Coal Co. vs. Clement, 14 Norris are to be distinguished from the present case in two important particulars. Clement's surveyors, in those trials, denied that there was any original work ever made for the Brush Valley surveys except the marking of the north lines of those surveys. They denied that the line found by Rockefeller between the Billington and Reynolds with the ancient marks all along the line from the north to the point where Rockefeller found the maple corner, was an original line made for the division line between the Billington and Reynolds in 1793, but that the trees marked upon that line were all too young by one year.

The object of that was to destroy the maple corner as a land mark in the southern boundary of the Brush Valley block, and more effectually do this, and not only deny that there was no original work on the line between Billington and Reynolds as found by Rockefeller, but they claimed another line located as they alleged by the official course which differed from the marked line, and terminated on the south about 6 or 8 rods east of the Rockefeller maple corner. Mr. Clements and his surveyors never admitted the originality of the division line between the Reynolds and Billington until the plaintiff below on this trial had clearly shown the line to be an original dividing line. Then they confessed that that line was original, and the learned court, in commenting upon that testimony, on page 134 of the printed record, made these observations: "In this connection we call the attention of the jury to the evidence relating to the original work found on the line running from the northeast corner of the John Reynolds, southwardly to the small maple i. e., the division line between the Reynolds and the Billington. The plaintiff has clearly shown *and indeed the defendant's surveyors, including some who testified to the contrary at former trials,* state that line is a well marked line of the date of the original survey of 1793. Moreover, it is the only cross-line of the block upon which has been found any evidence showing actual work thereon by the surveyor. Now that the Reynolds-Billington line was actually run by the surveyor is a fact worthy of consideration; for it suggests that in returning the maple as 326 rods distant from the northeast corner of the John Reynolds the deputy surveyor had ascertained the distance not by computation or protraction but by actual measurement. It is indeed true that chaining might not insure against mistake, yet, the line having been actually run upon the ground by the deputy surveyor, we

might fairly expect to find the maple at the end of the line as officially returned, or within a reasonable distance thereof." That maple corner wherever it was, definitely fixed the southern boundary of that block of surveys. The concession therefore of the originality of that division line in connection with the proof that it was found upon the ground in 1847, proved by the deposition of one, a deceased witness, and three living witnesses produced upon this trial, went very far to convince the jury who rendered a verdict for the plaintiff in this case.

As both plaintiff and defendant on the trial claimed that there were original marks upon the ground made in 1793, by the deputy surveyor when he located these lands, sufficient to locate the whole southern boundary of the Brush Valley block, it will hardly be contended that the calls of a younger survey, and marks made for younger surveys, not at all made for this land, could have any effect upon the original marks, and the only weight to be given to such evidence was that it could be used to corroborate the original work made for older surveys, and this is the effect the court gave to it, and it certainly could have no greater effect.

It may be well to refer specifically to the fifteenth and seventeenth specifications of error by which the defendant sought to have the Court instruct the jury that in fixing the northern boundary of the Lewis Walker, Nathaniel Brown, Ebenezer Branham and William Elliott "the post by the pine," the southwest corner of the Francis West, and the southeast corner of the Richard Martin, and the short line running westwardly from the "post by the pine," along a portion of the southern side of the Richard Martin should be controlling factors in the determination of such northern boundaries. The post by the pine was a corner made for the Francis West, an older survey than the Branham, and the other surveys located at the same time.

The instructions prayed for in these specificatiens disregarded the effects of the calls for the Brush Valley block. The instructions prayed for assumed that there were no lines marked upon the ground for the southern boundary of the Brush Valley block or for the northern line of the William Elliott, Lewis Walker, Nathaniel Brown and Ebenezer Branham, an affirmation of the points submitted would have been clear error for the rule of law undeniably is.that where the lines are marked upon the ground they definitely fix and determine the survey. Where they are not marked upon the ground the calls for older and adjoining surveys prevail, over courses and distances returned in the official survey. The calls for an adjoining older survey are in the return and a part of it, they indicate where the lines should be run, and the legal effect of such calls is to control both courses and distances.

Now applying that rule to the facts presented to the court the Ebenezer Branham in its northern boundary would be limited to the "post by the pine," and the short line one hundred and fifty rods long, the southern bounndary of the Richard Martin, beyond that point there is no pretext of any mark upon the northern side of the Branhnm, Nathaniel Brown, ~~Lewis Brown~~, Lewis Walker and William Elliott, from that point westward these surveys as a matter of law would answer their calls on the north for the Samuel Lobdell and the other surveys constituting the Brush Valley block. As an illustration of the rule stated in the case of Quinn vs. Heart, 43rd Pa. 337, may be referred to. In that case the following rule was laid down: "Lines run and marked on the ground are the true survey, and when they can be found will control the calls for a fixed boundary and establish the survey but where a younger survey calls for an older as an adjoiner, and no

lines are found marked for the younger, on the side on which the older is called for, the line of the older becomes the division line between the tracts.

The lines returned into the land office determine the location only where no adjoining survey and no natural monument is called for by the younger, and no lines can be found on the ground. Therefore, in a case where a younger survey called for an elder, and no division line was found to have been marked on the ground for the younger, when it was surveyed, it was not error in the court to permit a jury to locate the younger survey according to its calls, instead at its official lines."

In the case of Quinn vs. Heart, in order that the survey in that case might answer its call for an older and adjoining warrant, a line south sixty-seven degrees, east in the return of survey was rejected, and four other lines and corners substituted, none of which were in the official return of survey. The court say "observe, the question is not whether the *court* might reject the official lines in favor of the calls, for that was not done, but the question is whether it was error for the court to give the jury a chance to reject them. It was not error to submit the question to the jury unless it was the duty of the court to sacrifice the calls to the official lines.

Not only is there no such rule as the plaintiff is obliged to contend for, but on the contrary this court was willing, so long ago as 1836 to disregard lines actually run on the ground, in order to carry a survey to the adjoiners called for. See the opinion of Huston J., in Mortz vs. Hartley, 4 Watts, 263. And in Cox vs. Couch, 8 Barr, 154, Chief Justice Gibson declared that it "is a principle of construction that where land is described by courses and distances, and also by calls for adjoiners, the latter, where there is a discrepancy, invariably govern, and it is as applicable

to conveyances as it is to official surveys. This case was cited with approbation by Judge Rodgers in Petts vs. Graw, 3 Harris 222, and the same principle of construction was applied to conveyances of city lots. The opinion of Judge Houston in Mortz vs. Hartley, has been qualified in subsequent cases; Walker vs. Smith, 2 Barr, 45; Thomas vs. Mourer, 3 Harris, 143; Henry vs. Henry, 5 Barr, 249; but so far only as concerns lines actually run and marked. The result of the authorities may be stated thus: The lines run and marked on the ground are the true survey, and when they can be found will control the calls for a natural or fixed boundary, and conclusively establish the survey; but when a younger survey calls for an older as an adjoiner, and no lines are found to have been marked for the younger on the side on which the older is called for, the line of the older becomes the division line between the two tracts; or, in other words, the younger is to be laid so as to adjoin the older. If no adjoining survey and no natural, monument be called for by the younger, and no lines be found on the ground, then the lines returned into the land office determine the location."

In Youkin vs. Cowan, 10 Casey, 198. It is decided that where the lines are not actually run and marked on the ground the survey is to be carried to its calls of adjoiners, even though it overrun the distances returned on the survey.

The case of Cadwell vs. Holler, 4 Wright, 160. It was held that "where there were no lines upon the ground, and there was a discrepancy between the lines of the tract as returned in the survey, and the land called for as an adjoiner in the return, the calls must govern and will overrule the lines returned by courses and distances."

In Wagner vs. Wagner, 68th Pa. S. Reports, 394; the Supreme Court, of Penna. held, that "certified copies of

official surveys, connected and separate, given in evidence in the trial below, and now before us, very conclusively show that the Samuel Davis application, referred to in the testimony, was located in 1783, and the survey duly returned into the land office; that the Thomas Hamilton and Margaret Miller warrant, issued 25th September, 1784, called for the Davis survey, and was surveyed and returned into the office in accordance with its call, to wit: As adjoining the Davis survey. This *prima facie* excluded the possibility of a vacancy between these surveys; and unless the state of facts was rebutted in some way, the Commonwealth had from thenceforth no unappropriated lands between these tracts, and could confer no title upon a subsequent grantee from her, claiming independently of the warrantees mentioned. There was not the slightest testimony in the case to show that the Hamilton and Miller warrant was actually located short of its call, the consequence of which is, that it was carried to the Davis survey upon principles too well settled to be for a moment doubted."

Whatever therefore may be the rights of the parties in a contest between the owners of the Richard Martin and the owners of the Branham, so far as the Branham calls to adjoin the Martin, as to the lines between those two surveys the calls of the Branham for the Samuel Lobdell and Joshua Bean, and the calls of the Nathanial Brown, Lewis Walker, and William Elliott to go to the Brush Valley surveys for a distance of nearly seven miles beyond the western line of the Martin, can all be answered without at all interfering with the rights between the Martin and the Branham surveys. It will hardly do to say that the Branham in answering its call for the Martin shall not answer its other calls for the Lobdell and Bean, even though it requires a change in the course of one of

the lines of the Branham survey. The authorities already cited establish the rule that calls for an adjoiner will control courses and distances.

In conclusion, we think this case was fairly and impartially tried and the verdict justified under the law and the facts.

JAMES RYON.
JOHN W. RYON,